LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 6 1970
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1970

No. 1157

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,
Petitioner,

v.

RUSSELL JUDAS NELSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANDREW P. MILLER
Attorney General of Virginia

RENO S. HARP, III
Assistant Attorney General of Virginia

W. LUKE WITT
Assistant Attorney General of Virginia

GERALD L. BALILES
Assistant Attorney General of Virginia

Supreme Court Building
Richmond, Virginia 23219

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
OPINIONS BELOW	1
THE JUDGMENT	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT	6
CONCLUSION	18
CERTIFICATE OF SERVICE	18

TABLE OF CITATIONS

Cases

Allred v. Peyton, 385 F.2d 360 (4th Cir. 1967) 12, 14, 15, 16

Austin v. Peyton, mem. dec. no. 10,784 (4th Cir. April 21, 1967) 15

Boles v. Kershner, 320 F.2d 285 (4th Cir. 1963) 13

Brookman v. Peyton, mem. dec. no. 11,141 (4th Cir. September 12, 1968) 16

Bute v. Illinois, 333 U.S. 640, 656-657 (1948) 8

Cabaniss v. Cunningham, 206 Va. 330, 333, 143 S.E.2d 911, 913 (1965) 6, 9

Carroll v. United States, 354 U.S. 394, 406 (1957) 7

Clark v. Peppersack, 371 U.S. 848 (1962) 11

Page

Clark v. Peyton, 207 Va. 444, 150 S.E.2d 533 (1966) 6

Coleman v. Peyton, mem. dec. no. 12,714 (4th Cir. November 20, 1968) 16

Conners v. Peyton, mem. dec. no. 12,157 (4th Cir. December 18, 1968) 13, 14, 16

Davis v. Boles, 247 F.Supp. 751 (N.D. W.Va. 1965) 16

Dillon v. Peyton, 288 F.Supp. 163 (W.D. Va. 1968) 16

Douglas v. California, 372 U.S. 353 (1963) 9, 16

Draper v. Washington, 372 U.S. 487 (1963) 9

Duffield v. Peyton, 209 Va. 178, 162 S.E.2d 915 (1968) 6

Elam v. Peyton, 265 F.Supp. 231 (W.D. Va. 1967) 16

Ferby v. Peyton, 210 Va. 129, 169 S.E.2d (1969) 9

Gardner v. State, 91 Ida. 909, 435 P.2d 249 (1967) 11

Gibson v. Peyton, 262 F.Supp. 574 (W.D. Va. 1966) 16

Ginn v. Maryland, mem. dec. no. 12,429 (4th Cir. December 17, 1968) 16

Goesaert v. Cleary, 335 U.S. 464 (1948) 9

Griffin v. Illinois, 351 U.S. 12 (1956) 9, 10

Griffin v. Peyton, 284 F.Supp. 650 (W.D. Va. 1968) 16

Griffith v. Maryland, mem. dec. no. 10,893 (4th Cir. August 7, 1967) 15

Grigg v. United States, mem. dec. no. 11,817 (4th Cir. September 4, 1968) 16

Hall v. Peyton, 299 F.Supp. 613 (W.D. Va. 1969) 16

Harris v. Beto, 392 F.2d 191 (5th Cir. 1968) 17

Hodges v. United States, 282 F.2d 858 (D.C. Cir. 1960) 17

Jackson v. Peyton, mem. dec. no. 11,656 (4th Cir. March 26, 1968) 16

Page

Lawrence v. Peyton, 209 Va. 610, 166 S.E.2d 277 (1969) 9

Long v. District Court of Iowa, 385 U.S. 192 (1966) 9

Magee v. Peyton, 343 F.2d 433 (4th Cir. 1965) 12

Meadows v. State, 3 Md. App. 441, 239 A.2d 767 (1968) 11

Morgan v. Peyton, mem. dec. no. 12,337 (4th Cir. December 6, 1968) 14

Pate v. Holman, 341 F.2d 764 (5th Cir. 1965) later modified in 345 F.2d 546 (1965) 17-18

Peyton v. King, 210 Va. 194, 169 S.E.2d 569 (1969) 6

Peyton v. Webb, 207 Va. 417, 149 S.E.2d 889 (1966) 6, 10, 16

Rayne v. Warden, 198 F.Supp. 552, 555 (D. Md. 1961) 11

Robinson v. Peyton, mem. dec. no. 12,627 (4th Cir. September 30, 1968) 16

Ryan v. Louisiana, 282 F.Supp. 378 (E.D. La. 1967) 18

Sand v. Peyton, mem. dec. no. 12,647 (4th Cir. October 2, 1968) 8, 15

Shenton v. Maryland, mem. dec. no. 12,794 (4th Cir. November 12, 1968) 16

Smith v. McMann, 416 F.2d 648 (2nd Cir. 1969) 16

Smith v. Peyton, 207 Va. 515, 151 S.E.2d 382 (1966) 9

Smith v. Peyton, mem. dec. no. 12,265 (4th Cir. November 15, 1968) 15

Smith v. Warden, 280 F.Supp. 827 (D. Md. 1968) 10

Stokes v. Peyton, 207 Va. 1, 147 S.E.2d 773 (1966) 9

Thacker v. Peyton, 206 Va. 771, 146 S.E.2d 176 (1966) 6

Thacker v. Peyton, mem. dec. no. 10,949 (4th Cir. June 6, 1968) .. 16

Tigner v. Texas, 310 U.S. 141 (1940) 9

Page

Turner v. North Carolina, 412 F.2d 486 (4th Cir. 1968) 13

United States v. Davis, mem. dec. misc. no. 326 (4th Cir. June 28, 1967) 16

United States ex rel Bjornsen v. LaVallee, 364 F.2d 489 (2nd Cir. 1966), cert. den. 386 U.S. 988 (1967) reh. den. 387 U.S. 915 (1967) 17

United States ex rel Green v. Pate, 411 F.2d 884 (7th Cir. 1969) 17

United States v. Robinson, 361 U.S. 220, 226 (1960) 7

Via v. Peyton, 208 Va. 387, 158 S.E.2d 127 (1967) 9

Victor v. Lane, 394 F.2d 268 (7th Cir. 1968) 11, 17

Wade v. Peyton, mem. dec. no. 11,507 (4th Cir. March 11, 1968) 15

Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968) 13

Worts v. Dutton, 395 F.2d 341 (5th Cir. 1968) 17

Wynn v. Page, 369 F.2d 930 (10th Cir. 1966) 16

Statutes and Other Authorities

39 F.R.D. 69, 193 10

Fed. R. Crim. P. 32(a)(2) 8, 10, 14

Md. R. Proc. 719 11

Rules of Criminal Practice and Procedure, Rule 3A:25(f) 11

28 U.S.C. § 1254 ..... 2, 3

28 U.S.C. § 2254 3

U. S. S. Ct. R. 19 18

Va. Code Ann. § 19.1-282 (1960 Repl. Vol.) 6

Va. Const. Art. VI, § 88 6

Supreme Court of the United States

October Term, 1970

No. .....

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

RUSSELL JUDAS NELSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

James D. Cox, Superintendent of the Virginia State Penitentiary, successor to C. C. Peyton, deceased, prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Fourth Circuit entered on October 6, 1969 in the case of *Russell Judas Nelson* v. *C. C. Peyton, Superintendent of the Virginia State Penitentiary*. On October 14, 1969, the mandate in the case was stayed upon application of the Superintendent.

OPINIONS BELOW

The memorandum order of the Supreme Court of Appeals of Virginia in the case of *Nelson* v. *Peyton*, decided

on October 10, 1967, is unreported; it has been included herein as Appendix I (App. p.. 1). The memorandum decision and order of the United States District Court for the Eastern District of Virginia, Richmond Division, both entered September 26, 1968, are not reported, but are included herein as Appendices V and VI (App. pp. 50-57).

The opinion of the Court below is reported at 415 F.2d 1154, but is also found in this brief as Appendix XI (App. pp. 62-70). On October 6, 1969, the Court denied—with some dissent—a motion for rehearing en banc. See Appendix XII (App. pp. 71-72).

THE JUDGMENT

On October 14, 1969, an order was entered in the United States Court of Appeals for the Fourth Circuit staying the issuance and transmission of a certified copy of the judgment of that Court in the premises to permit the Superintendent of the Virginia State Penitentiary to seek a writ of certiorari from this Court. Upon application of counsel for petitioner, the time for filing a petition for writ of certiorari in the above entitled cause was extended to and including February 7, 1970 by order of this Honorable Court of December 19, 1969.

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari in this case is grounded upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the Court below err in elevating a recently preferred federal procedural practice to the level of a constitutional mandate applicable to state convictions and appeals?

STATUTES INVOLVED

I

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 646. 62 Stat. 967." (28 U.S.C., § 2254)

II

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928." (28 U.S.C. § 1254)

STATEMENT OF THE CASE

On November 29, 1951, Russell Judas Nelson, Respondent, was convicted in a Virginia court for robbery and sentenced to a term of eight years. After serving less than three years of that sentence, Nelson was paroled. On January 20, 1956, less than two years from the date of his parole, Nelson was convicted in Virginia for another felony, grand larceny, for which he was sentenced to serve a term of two years. He was discharged from all felony sentences on March 3, 1960 (App. pp. 9-11).

Two years later, November 27, 1962, in the Hustings Court of the City of Richmond, Nelson was convicted for robbery and attempted rape for which he received a total term of twenty-five years. (An additional ten-year sentence was imposed on December 27, 1962, for recidivism—third conviction.) (App. pp. 9-11)

At the conclusion of Nelson's trial on November 27, 1962, for robbery and attempted rape, he neglected to express a desire to appeal his convictions (App. p. 24). He did not request his two attorneys to appeal nor did he attempt to contact counsel after trial with regard to his sentences (App. pp. 22, 24). Four years later, on December 7, 1966, Respondent was accorded a hearing in the Hustings Court of the City of Richmond upon a petition for a writ of habeas corpus with regard to his 1962 convictions (App. pp. 13-50). His trial attorneys testified at that hearing that there was an "extremely strong" case against Nelson (App. pp. 33, 39) and that after trial no appeal was mentioned by him nor was there any indication from him of a desire to appeal the case (App. p. 38). Nelson did state at the state hearing that, subsequent to his conviction, he had written the trial judge and "told him about my trial" (App. p. 24). A Court official testified that there were no letters to the trial judge in the records pertaining

to Respondent's convictions (App. pp. 47-48). This conflict in the evidence was resolved by the State Court against Nelson and by order of December 13, 1966, the habeas corpus petition was denied and dismissed. The judgment was affirmed by the Virginia Supreme Court of Appeals on October 10, 1967 (App. p. 1).

On December 26, 1967, Respondent Nelson filed in the United States District Court for the Eastern District of Virginia, Richmond Division, a habeas corpus petition in which he alleged that he had been denied the effective assistance of counsel. On September 26, 1968, upon review of the State Court records, the District Court agreed that there was no evidence that Respondent had been dissatisfied with the result of his trial or that he had desired an appeal (App. p. 53); nevertheless, the District Court concluded that Nelson had been denied an appeal (App. pp. 50-57, 60). The District Court ignored not only the law of Virginia, but also, at the time, the rule of the Fourth Circuit. In effect, the opinion stated that what is not constitutionally required of the Federal Courts may be declared as a constitutional mandate binding upon the States.

Upon appeal the opinion of the District Court was affirmed; the Fourth Circuit, in an opinion by a panel of three judges, reversed its previous rulings upon which many State and Federal Courts had relied. It stated that upon conviction defendant's counsel, in order to avoid the charge of ineffective assistance of counsel, must advise the defendant of his right of appeal, notwithstanding the defendant's previous—and sometimes numerous—courtroom experiences and knowledge (App. pp. 62-72).

ARGUMENT

The Ruling Of The Court Below Is Contrary To State And Federal Laws, Statutory And Decisional, Which Treat Advice Regarding Appellate Review As A Rule-Making Problem That Is Not Constitutional In Scope.

This case involves the important question of the extension of the right to appeal concept. Because the scope and breadth of the opinion below is at variance with settled Virginia practice, case law and previous rulings of the United States Circuit Court of Appeals for the Fourth Circuit, upon which courts of Virginia and other jurisdictions have relied, and because it is also in direct conflict with rulings of other Circuit Courts of Appeals,[1] this Honorable Court should grant certiorari in order that this question of imperative legal importance may be settled.

I

In Virginia, there is both a statutory and a constitutional right to appeal from a criminal conviction. *Va. Code Ann.* § 19.1-282 (1960 Repl. Vol.); *Va. Const. Art.* VI, § 88; *Peyton* v. *King,* 210 Va. 194, 169 S.E.2d 569 (1969); *Clark* v. *Peyton,* 207 Va. 444, 150 S.E.2d 533 (1966); *Cabaniss* v. *Cunningham,* 206 Va. 330, 333, 143 S.E.2d 911, 913 (1965).

The right, however, is not unconditional: Upon conviction the defendant must indicate to Court or counsel, in some manner, however halting or inept, that he is dissatisfied with the trial, the sentence imposed, or that he desires an appeal. *Peyton* v. *Webb,* 207 Va. 417, 149 S.E.2d 889 (1966); *Duffield* v. *Peyton,* 209 Va. 178, 162 S.E.2d 915 (1968); *Thacker* v. *Peyton,* 206 Va. 771, 146 S.E.2d 176 (1966).

---

[1] See pp. 16-17 *infra.*

In the present case the facts are uncontroverted. At the conclusion of Nelson's trial on November 27, 1962, in the Hustings Court of the City of Richmond, Virginia for armed robbery and attempted rape, his third and fourth felony convictions, Nelson never expressed to anyone a desire to appeal (App. p. 24). Indeed, the Courts below agreed that there was no record that Nelson was dissatisfied with the result of his trial or that he wished to appeal (App. pp. 53, 64).

From these facts the United States Court of Appeals for the Fourth Circuit concluded that Nelson had been denied an appeal. *Nelson* proclaims, for the first time by the Fourth Circuit Court, that one convicted in a *state court* of a felony, regardless of previous "courtroom experience" must be advised by counsel of his right to appeal. In the absence of that advice—or the lack of proof that such advice was imparted—the defendant is entitled to outright release if he cannot be retried or granted a belated appeal.

It is submitted that the Court below has confused notions of preferred practice with the actual mandate of the Federal Constitution. Indeed, the ruling of the Court flies in the face of state and federal laws, statutory and decisional, which treat advice regarding appellate review as a rule-making problem that is not constitutional in scope.

Provisions for appeal in criminal cases in federal courts is of relatively recent origin. *United States* v. *Robinson*, 361 U.S. 220, 226 (1960).[2] This Court, less than three decades ago, promulgated the Federal Rules of Criminal Procedure, pursuant to legislative authorization. It was *not until July 1, 1966,* however, that this Court, *for the first*

[2] A departure from an historical pattern of federal appellate rights and procedure is a matter for legislative decision. Frankfurter and Landis, *The Business of the Supreme Court*, 109-13 (1927); see, also, *Carroll* v. *United States*, 354 U.S. 394, 406 (1957).

time, required *by rule* that affirmative action be taken in federal courts with respect to advising defendants after imposition of sentence of the right of appeal. *Fed. R. Crim. P.* 32(a)(2). Now the Fourth Circuit proposes to elevate this federal *procedural* rule of preferred practice to one of constitutional magnitude and to accord to Nelson a constitutional right to advice in 1961 not guaranteed even then to federal defendants.

Such a strained and anomalous result by that Court ignores its own language uttered just months prior to *Nelson*:

> It is *only in the federal court,* and then only with respect to defendants tried on the plea of not guilty, that the trial judge must advise the defendant of his right of appeal. *Fed. R. Crim. P.* 32(a)(2). *Sand* v. *Peyton,* mem. dec. no. 12,647 at 2 (4th Cir. October 2, 1968). (App. pp. 58-60.)

It also spurns previous language of this Court that:

> . . . the Fourteenth Amendment does not, through its due process clause or otherwise, have the effect of requiring the several states to conform the procedure of their state criminal trials to the precise procedure of the federal courts. . . . There is nothing in the Fourteenth Amendment specifically stating that the long recognized and then existing power of the states over the procedure of their own courts in criminal cases was to be prohibited or even limited. *Bute* v. *Illinois,* 333 U.S. 640, 656-657 (1948).

This Court for more than a decade has made it clear that differences in access to the *instruments* needed to vindicate legal rights on appeal, when predicated upon the financial situation of the defendant, are repugnant to the Constitu-

tion. *Draper* v. *Washington,* 372 U.S. 487 (1963); *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Long* v. *District Court of Iowa,* 385 U.S. 192 (1966). Those cases, however, involved *demands* by the defendants *for trial documents,* all of which requests were "clear and unequivocal."

This case does not present the question of a Sixth Amendment right to counsel on appeal. Virginia's concern for the appellate rights of all defendants is clearly revealed in the long line of decisions beginning with *Cabaniss* v. *Cunningham, supra*[3]; rather the case involves the right of a state to govern the use—and abuse—of its appellate process, a practice which places an affirmative—but simple—duty upon Virginia defendants to proceed after the state has discharged its heavy burden of proof with regard to guilt and conviction.

All that the law requires is that the defendant give some indication to Court or counsel—however ineptly—that he was dissatisfied with the result, with the handling of the trial or that he desired an appeal. Once the defendant has discharged his affirmative obligation, the right to appeal and appointment of counsel—if indigent—attaches and must be respected. *Cabaniss* v. *Cunningham, supra.*

The Virginia rule is not premised upon the impecunious state of the defendant; it applies in all criminal cases, regardless of economic status or condition.

Indeed, in other cases this Court has not required absolute equality; lines have been drawn and sustained. *Tigner* v. *Texas,* 310 U.S. 141 (1940); *Goesaert* v. *Cleary,* 335 U.S. 464 (1948); *Douglas* v. *California,* 372 U.S. 353 (1963). No less should be done here.

---

[3] See, for example, *Ferby* v. *Peyton,* 210 Va. 129, 169 S.E.2d 438 (1969); *Lawrence* v. *Peyton,* 209 Va. 610, 166 S.E.2d 277 (1969); *Via* v. *Peyton,* 208 Va. 387, 158 S.E.2d 127 (1967); *Smith* v. *Peyton,* 207 Va. 515, 151 S.E.2d 382 (1966); *Stokes* v. *Peyton,* 207 Va. 1, 147 S.E.2d 773 (1966).

This Court has recognized, also, that a state may protect itself from frivolous appeals. *Griffin* v. *Illinois, supra,* at 24, which Virginia has attempted to do. *Peyton* v. *Webb, supra.* The rationale of the Virginia rule is understandable:

> To require counsel and/or the Court to advise every defendant of his right to appeal would invite and encourage all persons convicted of a crime to do so regardless of whether he has any meritorious ground for appeal. *Peyton* v. *Webb, supra,* at 422.

Persuasive policy arguments can be made for a more flexible, more desirable rule. But those policy questions, involving, as they do, many conflicting considerations of substance, must be resolved through legislation or the rule-making process and not by judicial decision. Such an approach is evident from a review of the Advisory Committee's notes for amendment of *Fed. R. Crim. P.* 32(a)(2). See 39 *F.R.D.* 69, 193. To rule otherwise is to interfere with state power to obtain what may be a desirable, but not constitutionally required, result.

Post-conviction appellate advice is now afforded federal defendants—not as a matter of constitutional right but of *recent procedural practice. Fed. R. Crim P.* 32(a)(2). If the Fourth Circuit's decision were accepted and extended to its logical conclusion, all defendants would be entitled as a constitutional right to be advised of their right to apply for certiorari to the Supreme Court of the United States and, after that, if unsuccessful, to file petitions for writs of habeas corpus; in *Smith* v. *Warden,* 280 F.Supp. 827 (D. Md. 1968), such a contention was flatly rejected:

> 'This court is aware of no authority which holds that a defendants' constitutional rights have been infringed simply because his counsel has failed to advise him of

> his right to seek a writ of certiorari to the Supreme Court of the United States after his conviction has been affirmed by the highest court of the state. *The duty of counsel* to do so in federal prosecutions in this circuit *is based upon the plan of the Fourth Circuit adopted under the Criminal Justice Act of 1964, and not upon any constitutional provision, statute or general principle of criminal procedure.* (Emphasis supplied.) 280 F.Supp. at 829.

In Maryland the legislature recently specified *by rule* that, effective September 1, 1967, counsel shall advise his client of the right of appeal. *Md. R. Proc.* 719. Prior to such legislative action, the Maryland rule was similar to the present Virginia practice and based upon decisions of the Fourth Circuit before *Nelson. Rayne* v. *Warden,* 198 F.Supp. 552, 555 (D. Md. 1961); *Meadows* v. *State,* 3 Md. App. 441, 239 A.2d 767 (1968); *Clark* v. *Peppersack,* 371 U.S. 848 (1962). Under Indiana practice, counsel, after conviction of his client, is neither obliged nor authorized to proceed without a request by defendant for an appeal. *Victor* v. *Lane,* 394 F.2d 268 (7th Cir. 1968). A similar practice prevails in Idaho. See *Gardner* v. *State,* 91 Ida. 909, 435 P.2d 249 (1967).

In Virginia the State Bar Association proposed in 1969 for adoption by the Supreme Court of Appeals the *Rules of Criminal Practice and Procedure.* Rule 3A:25(f), if adopted, would change current practice regarding appeals:

> *Notification of right to appeal*
>
> After the imposition of sentence on a not guilty plea in a felony case, the Court shall advise the accused of his right to petition the Supreme Court of Appeals for a writ of error and of the right of an indigent to proceed *in forma pauperis* and to have counsel appointed for him.

The treatment of this problem of post-trial appellate advice through the rule-making powers of the federal and state courts makes it clear, then, that no constitutional problem is involved under the facts of this case. The ruling of Fourth Circuit was in error and should be overturned by this Court. The decision represents a total reversal in thinking by the Court below and, if allowed to stand, will have far-reaching implications for the concept of federalism and the administration of justice.

II.

Nelson reverses a rule long followed by state and federal courts. Indeed, the Virginia rule is identical to that enunciated so cogently and frequently by the Court below before its change of thinking in *Nelson*.

In *Magee* v. *Peyton*, 343 F.2d 433 (4th Cir. 1965), the evidence revealed that after the trial defendant and his father, in their conversations with original counsel, were informed that there would be no new trial or appeal without appropriate payment for future services; they wrote the trial court regarding a new trial and requested the appointment of counsel because of financial inability to retain an attorney. The letters went unanswered. The Fourth Circuit Court held that the request for an appeal had been ignored and concluded that Magee had been denied the assistance of counsel on appeal.

While the request for an appeal was evident in *Magee*, the sole question in *Allred* v. *Peyton*, 385 F.2d 360 (4th Cir. 1967) was whether Allred properly asserted his right to an attorney in seeking an appeal. The District Court concluded in the affirmative after reviewing a letter from Allred to his attorneys with regard to their view of his case.

The District Court said that *Magee* controlled—that while there was no direct request for counsel the letter should be

construed as a request for an appeal. The Fourth Circuit agreed that there was no specific request for an appeal, but then declared that the letter's broad language could not be interpreted as a request for an appeal—even by a layman. According to the Fourth Circuit:

> Here the entire question is simply whether Allred made known his desire to appeal. Again, we think he did not. 385 F.2d at 362.

In an even earlier case, the record showed that the defendant desired an appeal and evidenced such a desire to court and counsel shortly after trial. His requests were ignored. The Fourth Circuit affirmed the lower court's conclusion that the disregarding of the defendant's request denied him the same appellate review *afforded others upon request. Boles* v. *Kershner,* 320 F.2d 285 (4th Cir. 1963). (Emphasis supplied.) See, also, *Williams* v. *Coiner,* 392 F.2d 210 (4th Cir. 1968); *Turner* v. *North Carolina,* 412 F.2d 486 (4th Cir. 1968).

The above mentioned cases involved a determination of the existence of a request for an appeal. Implicit was the rule that some request must be made. While the Court below attempted to separate the issue in *Nelson* from those of prior cases (see 415 F.2d at 1156), the truth is that as recently as a matter of *months before Nelson, all seven members of the Court rejected the very reasoning now promulgated in Nelson.* For example, in *Conners* v. *Peyton,* mem. dec. no. 12,157 (4th Cir. December 18, 1968) one of the issues placed squarely before that Court was "the denial of the right to appeal because he [defendant] was not advised of this right." No. 12,157 at 2-3. The issue was rejected by the Court (Boreman, Bryan, Winters, JJ) as being without merit:

> . . . since there was no showing other than the bare fact that he was never advised of right to appeal. . . .

> And the apparent failure of the petitioner to ask his retained counsel to appeal his conviction further reveals the lack of merit in this asserted ground for relief. . . . *Conners* v. *Peyton, supra* at 2-3. (A copy of this opinion is included in the Appendix at p. 72.)

Morgan v. *Peyton,* mem. dec. no. 12,337 (4th Cir. December 6, 1968) put to the Court below the direct question of whether petitioner "was denied his right to appeal but because his attorney failed to inform him that he could appeal." *Morgan* v. *Peyton, supra* at 2. That Court (Haynsworth, Craven, Butzner, JJ) denied the claim, saying, in effect, that petitioner was not entitled to such advice in the absence of dissatisfaction on his part with the trial or its results. (*Morgan* v. *Peyton, supra,* is found herein as Appendix XIII-B, p. 76.)

In another case, the issue of the right to appeal was decided, although it was not even fully developed at the District Court level; the Court (Haynsworth, C.J., Craven, Butzner, JJ) dismissed the claim of denial of appeal with language that could not have been more explicit:

> It is clearly settled law that a state criminal defendant may not be denied his right to appeal because of his indigency. Not yet, however, is a state prisoner relieved of the burden of making his wish for an appeal known—however ineptly. It is only in the federal court and then only with respect to the defendants tried on a plea of *not* guilty that the trial judge must advise the defendant of his right of appeal. *Fed. R. Crim. P.* 32(a)(2). We held in *Allred* v. *Peyton,* 385 F.2d 360 (4th Cir. 1967) that *a state prisoner may not claim a denial of his right to appeal as a basis for federal habeas corpus relief unless he shows that he desired an appeal and in some way made that desire known, either to his attorney or to the trial court.* . . . There is nothing in the record of the present case to indicate that Sand

> ever wanted, sought or made known to anyone a desire for an appeal. . . . Under these circumstances, he cannot claim a denial of his right to appeal. *Sand* v. *Peyton,* mem. dec. no. 12,647 at 2 (4th Cir. October 2, 1968). (Emphasis supplied.) (A copy of this decision can be found at App. p. 58.)

After *Sand* the Court below considered another case, just prior to its ruling in *Nelson,* in which one of the allegations raised the question of denial of appeal by his "appointed attorneys." *Smith* v. *Peyton,* mem. dec. no. 12,265 (4th Cir. November 15, 1968). Smith claimed that he was never advised by his attorneys with regard to an appeal. The Fourth Circuit (Haynsworth, C.J., Sobeloff, Butzner, JJ) dismissed the claim in unmistakable language:

> . . . We have previously held that a defendant must make his desire for an appeal known to court or counsel in some manner, however halting or inept, before an affirmative obligation arises on the part of counsel to inform him of his right to an indigent's appeal. *Where he fails to indicate in any manner that he wishes to appeal he cannot claim that he was denied his right to appeal because counsel failed to inform him of his right. Allred* v. *Peyton,* 385 F.2d 360 (4th Cir. October 2, 1968). . . . *Smith* v. *Peyton, supra* at 2-3. (Emphasis supplied.)[4]

Examination of the indexed records of similar cases partially catalogued since 1967 in the Clerk's office of the United States Court of Appeals for the Fourth Circuit reveals numerous decisions adhering to *Allred, et al.*; all are directly contrary to the rule now proclaimed in *Nelson.*[5]

---

[4] See App. XIII-D, Copy of *Smith* v. *Peyton* opinion.

[5] See, for example, *Wade* v. *Peyton,* mem. dec. no. 11,507 (4th Cir. March 11, 1968); *Austin* v. *Peyton,* mem. dec. no. 10,784 (4th Cir. April 21, 1967); *Griffith* v. *Maryland,* mem. dec. no. 10,893 (4th Cir.

The number of Virginia *habeas corpus* petitions denied upon the basis of *Allred, Webb, et al.*, is not easily ascertainable, but, presumably, *Nelson* now invites countless unsuccessful state and federal habeas supplicants to reopen and relitigate the appellate advice issue. The decision, in short, does injury to the delicate federal-state relationship and creates a new and unnecessary dichotomy in federal-state law in an already complicated and crowded area of litigation.

The Fourth Circuit, however, does not stand alone; the Circuit Court of Appeals for the Tenth Circuit has held that because defendant was not advised of his appellate remedies, he was denied an appeal. *Wynn* v. *Page*, 369 F.2d 930 (10th Cir. 1966).

The Second Circuit Court of Appeals has recently held—in a sharply divided (4-3) opinion—that *Douglas* v. *California, supra*, imposes on the states an affirmative duty to warn every person convicted of crime of his right to appeal and his right to do so without personal expense by court-appointed counsel if he is indigent. *Smith* v. *McMann*, 416 F.2d 648 (2nd Cir. 1969).[6]

August 7, 1967); *Thacker* v. *Peyton*, mem. dec. no. 10,949 (4th Cir. June 6, 1968); *Brookman* v. *Peyton*, mem. dec. no. 11,141 (4th Cir. September 12, 1968); *Jackson* v. *Peyton*, mem. dec. no. 11,656 (4th Cir. March 26, 1968); *Grigg* v. *United States*, mem. dec. no. 11,817 (4th Cir. September 4, 1968); *Connors* v. *Peyton*, mem. dec. no. 12,157 (4th Cir. December 18, 1968); *Ginn* v. *Maryland*, mem. dec. no. 12,429 (4th Cir. December 17, 1968); *Robinson* v. *Peyton*, mem. dec. no. 12,627 (4th Cir. September 30, 1968); *Shenton* v. *Maryland*, mem. dec. no. 12,794 (4th Cir. November 12, 1968); *Coleman* v. *Peyton*, mem. dec. no. 12,714 (4th Cir. November 20, 1968); *United States* v. *Davis*, mem. dec. misc. no. 326 (4th Cir. June 28, 1967).

See, also, *Griffin* v. *Peyton*, 284 F.Supp. 650 (W.D. Va. 1968); *Davis* v. *Boles*, 247 F.Supp. 751 (N.D. W.Va. 1965); *Gibson* v. *Peyton*, 262 F.Supp. 574 (W.D. Va. 1966); *Elam* v. *Peyton*, 265 F.Supp. 231 (W.D. Va. 1967); *Dillon* v. *Peyton*, 288 F.Supp. 163 (W.D. Va. 1968); *Hall* v. *Peyton*, 299 F.Supp. 613 (W.D. Va. 1969).

[6] Note the particularly sharp dissent of Friendly, J. (with whom Lombard, C. J. and Moore, J. joined).

The Second Circuit in *Smith* openly acknowledged the reversal of its previous position as set forth in *United States ex rel Bjornsen* v. *LaVallee,* 364 F.2d 489 (2nd Cir. 1966), *cert. den.* 386 U.S. 988 (1967), *reh. den.* 387 U.S. 915 (1967), where it had stated previously:

> It would unquestionably have been commendable if the state had afforded such advice [citing authority]; but *The Constitution has not yet been held to require that such advice be furnished.* [Citing cases] 364 F.2d at 491. (Emphasis supplied.)

The law in the Circuit Court of Appeals for the Seventh Circuit, however, is contrary to the recent rulings of the Second and Fourth Circuits. In *Victor* v. *Lane, supra,* the issue involved the allegation that defendant had been denied an appeal because he had not been advised of his right to appeal. The claim was rejected:

> Although most would agree that it is good practice for a trial court to inform a convicted defendant of his right to appeal, and to be furnished counsel if he is indigent, *the absence of such advice is not deemed a denial of due process or equal protection.* (Emphasis supplied.) 394 F.2d at 269-70.

See, also, *United States ex rel Green* v. *Pate,* 411 F.2d 884 (7th Cir. 1969).

Before this Court amended the Federal Rules of Criminal Procedure, the Circuit Court of Appeals for the District of Columbia followed the Virginia rule. *Hodges* v. *United States,* 282 F.2d 858 (D.C. Cir. 1960). In addition, it would appear that the rule of the Circuit Court of Appeals for the Fifth Circuit is that the trial court must have knowledge that the defendant wishes to appeal and that he is indigent. *Harris* v. *Beto,* 392 F.2d 191 (5th Cir. 1968); *Worts* v. *Dutton,* 395 F.2d 341 (5th Cir. 1968); *Pate* v.

Holman, 341 F.2d 764 (5th Cir. 1965), later modified in 345 F.2d 546 (1965); *Ryan* v. *Louisiana,* 282 F.Supp. 378 (E.D. La. 1967).

CONCLUSION

Petitioner submits that the decision below should be reviewed because it erroneously elevates a federal procedural rule to one of Constitutional meaning binding upon state criminal procedures; it is in conflict with decisions of other Circuit Courts of Appeals, and it raises issues that have not been—but should be—settled by this Court. *U.S.S.Ct.R.* 19.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

RENO S. HARP, III
Assistant Attorney General of Virginia

W. LUKE WITT
Assistant Attorney General of Virginia

GERALD L. BALILES
Assistant Attorney General of Virginia

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Reno S. Harp, III, Assistant Attorney General of Virginia, a member of the bar of the Supreme Court of the United States and one of counsel for the Petitioner in the captioned matter, do hereby certify that on this 6th day of February, 1970, I mailed a copy of the foregoing Petition for Writ of Certiorari by first-class mail to Frank W.

Hardy, Esquire, and Daniel E. Rogers, II, Esquire, Attorneys at Law, Williams, Mullen and Christian, 510 United Virginia Bank Building, Richmond, Virginia, counsel for the respondent herein. All parties required to be served have been served.

RENO S. HARP, III
Assistant Attorney General of Virginia

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 6 1970
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1970

No. 117

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,
Petitioner,

v.

RUSSELL JUDAS NELSON,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANDREW P. MILLER
Attorney General of Virginia

RENO S. HARP, III
Assistant Attorney General of Virginia

W. LUKE WITT
Assistant Attorney General of Virginia

GERALD L. BALILES
Assistant Attorney General of Virginia

Supreme Court Building
Richmond, Virginia 23219

INDEX TO APPENDIX

App. Page

Appendix I

Order of the Supreme Court of Appeals of Virginia of October 10, 1967—Denial of State Habeas Corpus Petition 1

Appendix II

Federal Petition for a Writ of Habeas Corpus 2

Appendix III

Superintendent's Answer to the Habeas Corpus Petition 8

Appendix IV

State Habeas Corpus Transcript of Evidence of December 7, 1966 13

Appendix V

Memorandum Decision of the United States District Court of September 26, 1968 50

Appendix VI

Order of United States District Court of September 26, 1968 .. 56

Appendix VII

Motion to Alter or Amend Judgment of October 4, 1968 57

Appendix VIII

Order of United States District Court of October 4, 1968 60

Appendix IX

Notice of Appeal 61

Appendix X

Order of United States District Court of October 22, 1968 62

App. Page

Appendix XI

Opinion of the United States Circuit Court of Appeals for the Fourth Circuit, 415 F.2d 1154 (4th Cir. 1969) 62

Appendix XII

Order of the United States Circuit Court of Appeals for the Fourth Circuit of October 6, 1969—Denial of Motion for Rehearing en banc 71

Appendix XIII

United States Court of Appeals for the Fourth Circuit—Recent Cases With Holdings Directly Contrary to Nelson v. Peyton 72

A. Connors v. Peyton, Memorandum Decision No. 12,157 (December 18, 1968) 72

B. Morgan v. Peyton, Memorandum Decision No. 12,337 (December 6, 1968) 76

C. Sand v. Peyton, Memorandum Decision No. 12,647 (October 2, 1968) (See Appendix VII) 78

D. Smith v. Peyton, Memorandum Decision No. 12,265 (November 15, 1968) 78

APPENDIX I

Order of the Supreme Court of Appeals of Virginia of October 10, 1967—Denial of State Habeas Corpus Petititon Affirmed

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday *the* 10th *day of* October, 1967.

The petition of Russell Judas Nelson for a writ of error to a judgment rendered by the Hustings Court of the City of Richmond on the 13th day of December, 1966, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and C. C. Peyton, Superintendent of the Virginia State Penitentiary, was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said hustings court, which court shall allow court-appointed counsel the sum of $150 as compensation for services rendered on this appeal, and also his necessary direct out-of-pocket expenses.

And it is ordered that the Commonwealth recover of the plaintiff in error the said amount paid counsel appointed to represent him on this appeal, his necessary direct out-of-pocket expenses, the costs to be taxed by the clerk of this court, the amount paid counsel appointed by the said hustings court to represent the said Russell Judas Nelson therein, his necessary direct out-of-pocket expenses, and the costs to be assessed in this case by the clerk of the said hustings court.

A Copy,

Teste: Howard G. Turner, Clerk

By /s/ ALLEN L. LUCY
Deputy Clerk

APPENDIX II

Federal Petition for a Writ of Habeas Corpus

Place of detention: *Richmond, Virginia*

A. Criminal Trial

1. Name and location of court which imposed the sentence from which you seek relief:

   Hustings Court of the City of Richmond

2. The offense or offenses for which sentence was imposed (include indictment number or numbers if known):
   a. *Indictment charged stealing and attempt to rape*
   b. .....
   c. .....

3. The date upon which sentence was imposed and the terms of the sentence:
   a. *November 27, 1962, prison term of 30 years*
   b. .....
   c. .....

4. Check which plea you made:
   Plea of guilty: .....; Plea of not guilty: *X*

5. The name and address of each attorney, if any, who represented you at your criminal trial:
   Mr. James A. Turner, Richmond, Virginia

6. Did you appeal the conviction? *No*

7. If you answered "yes" to 6, list:
   the name of each court to which you appealed or sought certiorari:
   a. .....
   b. .....

the result and the date in each appellate court:

a. .....

b. .....

citations of appellate court opinions or orders:

a. .....

b. .....

8. List the name and address of each attorney, if any, who represented you on your appeal:

.....

.....

B. State Habeas Corpus

9. Before this petition did you file with respect to this conviction any petition for habeas corpus in a state court? *Yes*

10. If you answered "yes" to 9, list with respect to each petition:

the name and location of the court in which each was filed:

a. *Circuit Court of the City of Richmond*

b. .....

the disposition and the date:

a. *December 13, 1966, writ rejected by Hustings Court*

b. .....

the name and address of each attorney, if any, who represented you on your state habeas corpus:

a. *Mr. Willard H. Douglas, Richmond, Virginia*

b. *Mr. James R. Olphin, Richmond, Virginia*

11. Did you appeal from the disposition of your petition for habeas corpus in the state court? *Yes*

12. If you answered "yes" to 11, list:

the name of each court to which you appealed or sought certiorari:

a. *Supreme Court of Appeals of Virginia*

b. .....

the result and the date in each appellate court:

a. .....

b. .....

citations of appellate court opinions or orders on your state habeas corpus petition:

a. .....

b. .....

the name and address of each attorney, if any, who represented you on appeal of your state habeas corpus:

a. .....

b. .....

C. Federal Habeas Corpus

13. Before this petition have you filed with respect to this conviction any petition for habeas corpus in a Federal Court? *No*

14. If you answered "yes" to 13, list with respect to each petition:

the name and location of the court in which each was filed:

a. .....

b. .....

the result and its date:

a. .....

b. .....

citations of opinions or orders entered:

a. .....

b. .....

the name and address of each attorney, if any, who represented you:

a. .....

b. .....

15. Did you appeal from the action on the petition? .....

16. If you answered "yes" to 15, list:

the name of each court to which you appealed or sought certiorari:

a. .....

b. .....

the result in each court and the date:

a. .....

b. .....

citations of appellate court opinions or orders on your Federal habeas corpus:

a. .....

b. .....

the name and address of each attorney, if any, who represented you on appeal of your Federal habeas corpus:

a. .....

b. .....

D. Other Petitions, Motions or Applications

17. List all other petitions, motions or applications in any court not set out in A, B, or C. Include the nature of

the motion, the name and location of the court, the result, the date, and citations to opinions or orders. Give the name and address of each attorney, if any, who represented you.

a. .....

b. .....

c. .....

E. Present Petition

18. State the grounds which make your detention unlawful. Include facts.

a. *There was insufficient evidence, showing lack of probable cause, in violation of the IV Amendment to the Constitution of the United States.*

b. *Petitioner is a victim of a denial of the equal protection of the law, in the open violation of the XIV Amendment to the Federal Constitution.*

c. *The Petitioner has suffered the ineffective assistance of counsel, an unquestionable violation of the VI Amendment to our Constitution of the United States.*

19. List each ground set forth in 18, which has been presented to a state court:

a. *Insufficient evidence (lack of probable cause)*

b. *Denial of the equal protection of the law*

c. *Ineffective assistance of counsel*

List the proceedings in which each ground was raised:

a. *Habeas Corpus and Appeal*

b. (ditto)

c. (ditto)

20. If any ground set forth in 18 has not been presented to a state court, list each ground and the reasons why it was not:

a. *Your Petitioner has been rendered a victim of the deliberate procrastination of justice, another violation of the United States Constitution of an extent the violates the VI Amendment*

b. .....

c. .....

The violation had not gotten so serious prior to this petition.

/s/ RUSSELL J. NELSON
Signature of Petitioner
Address of Petitioner

* * *

FORMA PAUPERIS AFFIDAVIT

STATE OF VIRGINIA
CITY/COUNTY OF .....

The petitioner being duly sworn, says:

1. He is unable to pay the costs of this action or give security therefor;

2. His assets amount to a total of $2.05.

/s/ RUSSELL J. NELSON
Signature of Petitioner

Subscribed and sworn to before me
this 19 day of December, 1967

/s/ ALBERT W. RICE
Notary Public

My Commission Expires April 3, 1970

APPENDIX III

Superintendent's Answer to the Habeas Corpus Petition

Now comes the respondent, by counsel, and for his answer to the petition says:

1. Respondent is now detaining the petitioner pursuant to a judgment of the Hustings Court of the City of Richmond of November 27, 1962, wherein petitioner was convicted of robbery and sentenced to fifteen years in the Virginia State Penitentiary. (See Exhibit I—Copy of Prison Record.)

2. Respondent denies all allegations in the petition not expressly admitted.

3. Respondent admits that petitioner was granted a plenary hearing pursuant to a petition for a writ of habeas corpus in the Hustings Court of the City of Richmond and that the Supreme Court of Appeals of Virginia denied a petition for a writ of error to the judgment of the Hustings Court of the City of Richmond denying the petition for a writ of habeas corpus. (See Exhibit II—Copy of Order of the Supreme Court of Appeals of Virginia.)

4. Respondent says that Allegation 18a is not the proper subject for federal habeas corpus.

5. Respondent says arrangements are being made to have the records of the state habeas corpus proceedings made available to this Court.

Wherefore, respondent prays that the petition for a writ of habeas corpus be denied and dismissed.

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY

By: .....
COUNSEL

RENO S. HARP, III
Assistant Attorney General

OVERTON P. POLLARD
Assistant Attorney General

Supreme Court Building
Richmond, Virginia

* * *

INSTITUTION: Prison

PRISON RECORD

EXHIBIT I

Date: May 20, 1966

Name: Russell Nelson Number: 82487 Race: Colored

Alias: None

Committed: Dec. 3, 1962

D.O.B.: 11-25-30 Single Occupation: Const. Worker

Court: Richmond City Hustings Court

Date: November 27, 1962

Crime: Robbery—15 Term: 25 Years
Commuted 7-15-64, to 14 yrs. 9 mos.
(Blood Transfusion)
Attempted Rape—10

Added for escape: None Years:

Richmond City Cir. Ct. 12-27-62

Added for Third Conviction: 10 (5 yrs. Suspended good behavior) Total Term: 29 yrs. 9 mos. Years.

Served: 3 Years 5 Months 17 days None days jail time included.

Term Expires: October 3, 1982

Eligible for Parole: 5-11-70

PRISON RULES VIOLATED

1st Conviction: No. 61211—Russell J. Nelson. Committed Nov. 29, 1951, Richmond City Hustings Court, Nov. 29, 1951.

Robbery—8 yrs.

Paroled: Sept. 27, 1954.

2nd Conviction: No. 68913—Russell Junious Nelson. Committed 1-20-56, Henrico County Circuit Court, Jan. 20, 1956.

Grand Larceny—2 yrs.

Left to Serve from Parole: 2 yrs. 4 mos. 2 days.

Richmond City Cir. Ct. 5-16-56, 2nd Conviction—1 yr.

Total Term 5 yrs. 4 mos. 2 days.

Discharged: March 3, 1960.

STUART J. MELTON, Director
Bureau of Records and Criminal
Identification, Virginia Penitentiary
Richmond, Va.

May 20, 1966

RUSSELL NELSON No. 82487

Time Started—12-3-62

DATE	COURT	CRIME	TERM	EXPIRES
11-27-62	Rich. City Hust. Ct.	Robbery	15 yrs.	10-3-72
Commuted 7-15-64 to 14 yrs. 9 mos. (Blood Transfusion)				
		Attempted Rape	10 yrs.	6-3-79
12-27-62	Rich. City Cir. Ct.	3rd Con.	10 yrs.	10-3-82
(5 yrs. of this term suspended during good behavior)				

TOTAL TERM—29 yrs. & 9 mos.

This is to certify that the foregoing is a true and correct summary of the Prison Record of Russell Nelson, No. 82487, an inmate now confined in the Penitentiary. That said summary is taken from the records on file at the Virginia State Penitentiary, and that Russell Nelson is now serving a term for fifteen (15) years imposed upon him by the Hustings Court of the City of Richmond, on November 27, 1962, for Robbery.

/s/ STUART J. MELTON
Stuart J. Melton, Director
Bureau of Records
Virginia State Penitentiary

EXHIBIT I

* * *

EXHIBIT II

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday *the* 10th *day of* October, 1967.

The petition of Russell Judas Nelson for a writ of error to a judgment rendered by the Hustings Court of the City of Richmond on the 13th day of December, 1966, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and C. C. Peyton, Superintendent of the Virginia State Penitentiary, was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said hustings court, which court shall allow court-appointed counsel the sum of $150 as compensation for services rendered on this appeal, and also his necessary direct out-of-pocket expenses.

And it is ordered that the Commonwealth recover of the plaintiff in error the said amount paid counsel appointed to represent him on this appeal, his necessary direct out-of-pocket expenses, the costs to be taxed by the clerk of this court, the amount paid counsel appointed by the said hustings court to represent the said Russell Judas Nelson therein, his necessary direct out-of-pocket expenses, and the

costs to be assessed in this case by the clerk of the said hustings court.

A Copy,

Teste: Howard G. Turner, Clerk

By /s/ ALLEN L. LUCY
Deputy Clerk

Costs due the Commonwealth
by plaintiff in error in
Supreme Court of Appeals:
Attorney's fee $150.00 plus his costs and expenses
Filing fee 1.50

Teste: Howard G. Turner, Clerk

By /s/ ALLEN L. LUCY
Deputy Clerk

EXHIBIT II

APPENDIX IV

State Habeas Corpus Transcript of Evidence of December 7, 1966

[TR. PP. 3-55]

THE CLERK: In the Hustings Court of the City of Richmond the 7th day of December, 1966, a hearing upon a petition for a writ of habeas corpus. The Petitioner, Russell Judas Nelson, is represented by Mr. James R. Olphin; the Respondent, Mr. C. C. Peyton, Superintendent of the Virginia State Penitentiary, is represented by Mr. Reno Harp, the Assistant Attorney General.

MR. OLPHIN: May it please the Court, I should like to announce the association of Willard H. Douglas, Jr., as counsel for Petitioner.

THE COURT: Very well.

MR. OLPHIN: He has worked with me here from the beginning

THE COURT: Yes, sir.

MR. OLPHIN: of this case and has a good deal of experience in this area of the law.

THE COURT: Very well.

MR. DOUGLAS: May it please the Court. Your Honor, the Petitioner is presently incarcerated in the Virginia State Penitentiary and in May of this year filed his petition for a writ of habeas corpus. The Petitioner alleged several grounds in his petition, however, counsel has been unable to—in its investigation to find evidence to support all of the various grounds, and counsel has advised the Petitioner of that. However, we feel that the substantial question that remains that the evidence would support the questions of whether the Petitioner was denied the right of appeal, whether the Petitioner was—had the effective assistance of counsel. We realize that if the first question is answered in which he was denied the right of appeal the Court wouldn't have to look to the second question. But with that we would like to call our first witness.

MR. HARP: Now, if Your Honor please, I would like to know where in the petition it's alleged that this man was denied his right of appeal, on what page, sir.

MR. DOUGLAS: On page 10, ineffective assistance of counsel, the reason does also relate to the right of appeal.

MR. HARP: I think if Your Honor please, if he's going to allege ineffective—denial of right of appeal, sir, to make the record complete for all time, it would be advisable to

suggest that this petition should be amended to make such an allegation, because it's not in the petition as such.

THE COURT: Very well. Do you desire to amend the petition?

MR. DOUGLAS: Yes, sir, we would move to amend it.

MR. HARP: I would like to ask for a little recess so I could investigate that matter.

THE COURT: We will take a five-minute recess, Sergeant.

NOTE: At this time a short recess was had, after which:

MR. HARP: I have completed my investigation.

THE COURT: Do you accept an oral amendment to the petition?

MR. HARP: I think, if Your Honor please, that counsel should submit a written amendment in due course so that the record will be complete.

THE COURT: Very well.

MR. OLPHIN: If Your Honor please, at this point, I would like to move to exclude the witnesses.

THE COURT: Separate the witnesses, please, Sergeant. Swear the witnesses first.

NOTE: At this time the witnesses were sworn.

THE COURT: After the witnesses testify do not to discuss their testimony with the other witnesses.

MR. WILKERSON: Judge, I understand I won't be needed, may I be excused, sir?

THE COURT: Yes, sir.

MR. WILKERSON: Mr. Harp subpoenaed me, but I understand that he doesn't need me now.

THE COURT: By consent Mr. Wilkinson is excused. Call your first witness.

Russell Judas Nelson,

the Petitioner, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOUGLAS:

Q Would you state your name and address, please?
A My name is Russell Judas Nelson. My address was—

THE COURT: Speak up, please, so we can understand you.

A My name is Russell Judas Nelson, my address previous was 500 Spring Street

THE COURT: You are speaking into a recording machine, that isn't an amplifier. That's a recording machine.

Q When and where were you born?
A Richmond, Virginia.

Q What was the date of your birth?
A November 25, 1930.

Q How far did you go in school, Mr. Nelson?
A To the Sixth grade.

Q Directing your attention to the—to your petition for the writ of habeas corpus there are two crimes that you were charged with, which are mentioned in that petition, do you know the month, day and year when you were charged with those two crimes?

A All I know was when I was picked up I was over to a friend girl of mine house and they carried me to the police lockup and they carried me upstairs and fingerprint me and then they served the warrants to me.

Q Do you know what year?
A 1962.

Q Do you know the month and the day?
A October the 24th.

Q When were you tried for those crimes?
A November the 27th, 1962.

Q Did you employ an attorney to represent you in defending the two charges that were mentioned in the petition?

A Well, my oldest sister was going to get me a lawyer and she—

THE COURT: You'll have to speak up, I can't understand you, please.

A I say my old—

THE COURT: That isn't an amplifier, that is a recording machine,

A Yes, sir.

THE COURT: that doesn't carry your voice, just for recording.

Q I asked you did you employ an attorney to represent you in defending the two charges which were placed against you?

A No.

Q Did the Court appoint a lawyer to represent you?
A Yes.

Q Would you tell us when you first learned that the Court had appointed counsel to represent you in defense of those charges?

A When I was in jail.

Q Well, would you give us an idea, if you can, as to the month and year?

A It was in '62, but I don't know the month, just can't recall the month right off, it was in November, I imagine it was.

Q Do you know who your lawyer was?

A Mr. Oxenham and Mr. Turner.

Q Do you recall the first time that you saw your lawyer?

A I don't know the exact date.

Q Do you recall how long it was before the trial?

A Maybe a week, I don't want to say, I am not sure.

Q How many times did you talk to your lawyer before the trial?

A Twice.

Q Twice. Were you tried by the Court or by a jury?

A By the Court.

Q Did you make a statement to the Court at the conclusion of the trial?

A No, all I did was I bust out and cried.

MR. HARP: I can't hear the witness, if Your Honor please.

THE COURT: I have admonished him three or four times to speak up.

A I say all I did was bust out and cried right there and they carried me back there and I told the man that

locked me up that I want to see my lawyer and he say he didn't have time.

Q Who said he didn't have time?

MR. HARP: Now, I object, that's hearsay, if Your Honor please.

THE COURT: Objection sustained, that's hearsay evidence.

Q Did you talk to your lawyer after the trial was over?
A No.

Q Did you make any effort to contact your lawyer at the conclusion of the trial?
A I tried to.

Q When did you try to contact him?
A When I was back there.

Q Did your lawyer visit you any time after the conclusion of the trial?
A No.

Q Have you talked to the lawyer that represented you at that trial since that—since you were sentenced?
A No.

THE COURT: Speak up, please, for the record.

A No, sir.

MR. DOUGLAS: Your witness.

CROSS EXAMINATION

BY MR. HARP:

Q You say you had not seen your lawyer here after you were tried?
A No, sir.

Q And you saw him only twice before you were tried?
A Yes, sir.

Q When you say your lawyer, do you mean Mr. Oxenham or Mr. Turner or both of them together?
A Yes, sir.

Q Well, which do you mean?
A I mean I seen the two of them together—

Q In other words, you saw Mr. Oxenham and Mr. Turner twice together prior to the trial, correct?
A What you mean, before the trial you mean?

Q Yes?
A Yes, I seen them down the jail.

Q And how long did they talk to you on those two occasions?
A Approximately fifteen minutes.

Q Fifteen minutes?
A Maybe longer.

Q Did you have a watch?
A No, I was—just as I say, approximately.

Q What did you all talk about on those occasions?
A He asked me different questions.

Q About what?
A He asked me how long had I known this girl or did I know this Mines fellow, I told him I had seen him, but I didn't know his name.

Q Well, did you tell them how the crime was committed?
A I couldn't tell them that.

Q Did he ask you?

A He asked me.

Q Well, who is he now, which of them asked you?
A Mr. Oxenham and Mr. Turner.

Q Together?
A I don't know which one, I know one of them asked me, and I told them I didn't know anything about the crime.

Q What defense did you suggest to your attorneys?
A Excuse me, what did you say?

Q What defense did you suggest to your lawyers that you could use?
A All I told them that I didn't have anything to do with the crime.

Q But what defense—you know what defense means, don't you? In a court of law, you've been in Court before, haven't you?
A But I haven't never been to Court like this, no, sir.

Q Uh huh, but prior to your conviction, prior to your trial and conviction in this Court on December 27, 1962, you had been in Court before, hadn't you?
A Yes, sir.

Q In fact you had been in Court on several occasions, hadn't you?
A Yes, sir.

Q Now, my question to you, sir, is what defense did you suggest to your attorneys, was it a defense of alibi?
A No, sir, it wasn't no alibi, I told—

Q No alibi?
A I told him the truth.

Q What did you tell them?

A I told him that I hadn't did nothing to this girl, Miss Viola Scott, and that I had been knowing her a long time, quite a number of years, which I had.

Q Well, did you testify in your own behalf at your trial?

A Yes, sir, I spoke up.

Q Well, did you get on the witness stand and testify?

A Yes, sir.

Q And you tell the Court what had happened?

A Well, I told what I knowed about the case.

Q What did you know about the case?

A All I knew was the questions they asked me and I just gave them the answers, told them the truth, what was what, that's the best I could do.

Q And after you were convicted, did you ever write your lawyers, either Mr. Oxenham or Mr. Turner?

A No, sir.

Q Did you ever try to contact them, once you got to the Penitentiary, by writing to them?

A No, sir.

Q Do you recall when you were transferred to the Penitentiary after this conviction?

A December the 3rd, I believe it was.

Q And prior to this conviction in this Court you had been previously convicted on two occasions of felonies, had you not?

A Yes, sir.

Q That's all.

REDIRECT EXAMINATION

BY MR. DOUGLAS:

Q Did you ask your lawyer to appeal the case for you?

MR. HARP: Object, that's not rebuttal, if Your Honor please.

THE COURT: Well, I shall allow it anyway.

MR. HARP: All right.

Q Did you say anything to your lawyer about an appeal?

A Like I said before, I was back there, I was crying right there, they carried me in the back and I told the assistant deputy that carried me in the back, I told him that I want to see my lawyer.

Q Prior to the conclusion of the trial, did you say anything to your lawyer about an appeal?

A No, sir, I didn't.

Q Did your lawyer relate anything to you about an appeal?

A No, sir.

Q Was the question of an appeal ever discussed—

A No, sir.

Q you or your lawyer?

A No, sir.

RECROSS EXAMINATION

BY MR. HARP:

Q Now, isn't it a fact that Mr. Turner told you that if you wanted to appeal you had the right to a free appeal, and if you wanted to appeal you should notify the Judge?

A He didn't tell me anything.

Q Never told you anything?
A No, sir.

Q And you never expressed to him a desire to appeal, is that correct?
A I didn't—I hadn't seen either one of those lawyers until I think I came in this Courtroom.

Q You never wrote him a letter, did you?
A No, sir.

Q You never wrote the Judge a letter, did you, and asked to appeal the case?
A Well, I can't—I can't definitely say I didn't write to the Judge, I can't say.

Q You just don't remember?
A I may have wrote to the Judge, but I don't remember writing to the lawyer.

Q So you don't know what you did about trying to appeal the case, do you?
A I wrote to the Judge, but I mean I didn't—

Q When?
A I'm not sure of the date, but I think I wrote to the Judge.

Q Well, what Judge did you write to?
A Mr.—

Q Judge Huntley?
A Yes, sir.

Q And—but you don't know when you wrote to him?
A It was in—I'm quite sure it was in '62.

Q And do you have a copy of that letter?
A No, sir, I haven't.

MR. HARP: Does the Court have the original criminal file up there?

THE COURT: Yes, sir.

MR. HARP: Might I have the opportunity of examining it, sir. (pause) This is the habeas corpus file, Judge, I inquired of the criminal file.

THE COURT: He's getting it for you now. (pause)

MR. HARP: I'd like to wait, if Your Honor please, until we can find the criminal file.

THE COURT: All right, take a five-minute recess.

NOTE: At this time a short recess was had, after which:

Q Now, this letter you are talking about, did you write it or did somebody else write it for you?
A I had someone to write it for me.

Q And who wrote it for you?
A A boy named Coleman.

Q What Coleman, Thurber J. Coleman or J. Thurber Coleman?

A No, sir, I—we—his nickname is *Booty Reed,* but his last name is Coleman.

Q But you don't know when this letter was written?
A It was in '62, in December.

Q So, he was in the receiving unit with you?
A Yes, sir.

Q And you wrote Judge Huntley from there?

THE COURT: Speak up, please.

A I—

Q I can't hear you.
A Yes, sir.

Q You are sure of that now?
A I know I wrote a letter, if I say something I want to be sure.

Q I can't understand you, sir?
A I don't know, I just can't say I'm sure, I know I wrote a letter, but I just can't—I'm not sure whether it was in January—December or January, I'm just not sure.

Q Do you know what the letter said?

THE COURT: Speak up, please.

A I'm trying to think what the letter said—I had Honorable Judge Huntley—

Q You don't know what the letter said, then, do you?
A No, sir.

Q That's all.

THE COURT: Any further questions, Gentlemen?

RE-DIRECT EXAMINATION

BY MR. DOUGLAS:

Q Was that the only letter that you had written to the Court—did you ever have anyone to write any other letters?
A Not that I can recall.

Q Did you make any suggestions as to the contents of the letter, the message?
A You mean did I get an answer?

Q No, did you tell anyone what to put in the letter?

A No, he was—he was writing it himself. I was trying—I wanted to know how could I get back to the Court, you know. I don't know what else he put in there.

Q This person that wrote it for you, how did you meet him?

A I mean I've been knowing him all my life, name Coleman, he came up again, I live up on the hill and he live down the hill, that when I used to live on Hill Street.

Q Well, how did he come to write this letter, what did you tell him?

A All I told him, I say I would like to write to the—to the Judge of Hustings Court, Mr. Moscoe Huntley.

Q Write about what?

A How would I—how could I get back to Court and things like that, and what else he said I don't know.

Q Did you tell him anything about the trial?

A Yea, I told him about my trial.

Q Did you tell him anything about the facts?

A I told him how I got—how I managed to—you know—go to jail. I told him that, er ah, that how was I arrested, they just picked me up and gave me that time. He said "you should write to the Judge and see can you get back to Court and maybe he can help you", so I told him I would like for him to write for me, so he wrote the letter.

Q And this letter was written while you were in the receiving unit, is that correct?

A Yes.

Q No further questions.

RE-CROSS EXAMINATION

BY MR. HARP:

Q You don't know what was in the letter, do you?
A No.

Q You have no idea?
A No.

Q Thank you.

(Witness stood aside.)

Thomas H. Oxenham, Jr.,

introduced on behalf of the Petitioner, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOUGLAS:

Q Would you state your name and address, please?
A Thomas H. Oxenham, Jr., 8101 Longwood Road, Richmond, Henrico County, Virginia.

Q For the record, Mr. Oxenham, would you tell the Court how long you have been practicing law?
A I have been practicing at the present time since October 1954, in the City of Richmond.

Q Would you relate the circumstances by which you came in contact with the Petitioner, Russell Judas Nelson?
A He was one of several people that were appointed counsel, who were the regular appointed public defenders of this Court at that particular time, and Richard Turner and I were appointed to represent him.

Q When were you appointed to represent him?
A I don't have the exact date that I was appointed to represent him, he was tried on November the 27th, 1962, I

would say it was probably in October or November of that year that we were appointed.

Q Were you appointed to defend Mr. Melton, you mentioned Mr. Turner's name, was this a joint appointment?

A Yes.

Q In other words, the two attorneys were appointed to—

A Both of us were appointed to represent all those persons charged with a felony at that time that would be tried in this Court that had requested a public defender or had stated that they did not have sufficient funds to pay for an attorney of their own choosing.

Q Does—how many—you said that you were appointed along with Mr. Turner to defend all of the accused on felony charges, would you have an idea as to how many people, defendants were involved?

A No, this was back in 1962, I don't recall at all how many—anything that I would say in that line would be a guess, purely and simply.

Q Does your record show how many times you interviewed Mr. Nelson before the trial?

A No, it does not, it merely shows that I interviewed him quite extensively and I could not tell you whether it was

Q Does it show a date?

A once or five times, I don't know.

Q Does it show a date?

A No.

Q Do you have any dates?

A I have no dates at all except the date of the alleged offense and the date of the trial.

Q Do you remember what Mr. Nelson said concerning his defense?

A Yes, I have several notes to the effect of what he said in interview there, I—he was at that time 32 years old. He stated that at the time that this occurred, I'm not fully going by these notes, I'm just glancing at them. At the time that this occurred that he was in Boston, Massachusetts, I believe. He was supposed to have someone get a bus—ticket of a bus stub to us for that. He stated that he had left for Boston about the 18th or 19th of September and that he came back about October the 5th, 1962, which would have put him in Boston during that particular time, I mean during the time that this was supposed to take place, which was the 29th of September. He was supposed, as I say, to have the bus ticket stubs for these trips, at least the one that he came back from Boston. He gave me the name of a—of a person who lived in Boston, a man by the name of Earl Snead at 954 Tremont Avenue, in Boston, or Roxboro, Massachusetts, and said that he had a 'phone in his house, and in connection with that I called Boston and there was no listing under the name of Earl Snead. I do not have any note or any copy of the letter that I wrote him. It occurs to me that either Mr. Turner or I did, I'm not sure, but I have no copy in the file and I could not say for sure that I did. Further, Nelson told us that he had—I'm—I don't want to get this confused with mine, so if you will bear with me just a minute, sir—(pause) He further stated, I believe, to me, that he—I have this notation anyway, that he has known—he had known the victim, Viola Scott, all of his life and he had been in her home watching television and that they had been out drinking

together, so the point he was making there was that he was known to her and that she was known to him and there was some—some discussion that came up in the investigation of the case, in the trial of the case, that it was a little difficult for her to identify him, and this was how this came in, which indicates to me that probably we talked to him, at least a second time. This seemed to have been—this note seems to have been made at another time.

Q Did the petitioner, then defendant, tell you that he was innocent of the—

A Yes, he did.

Q crime as charged? Did the petitioner, Nelson, make a statement to the Court after he—after sentence had been imposed?

A I don't recall that he did. He—this I'm going strict ly on memory, I don't have this in my—my notes, but we did not feel in any event before this that we could refer this man because he had a previous record, and upon the finding of guilty, he was tried with Mines, is that we referred, Ernest Mines, and the Judge then imposed sentence on Nelson and my recollection is at that time that he was very much upset, primarily because he was in—he was thinking about the recidivist time that he would get in addition to the time that he had here and he made no statement at all, but just my recollection is that he moaned out in Court as in—"Oh, me", or something to that as he was led from this Courtroom back into the lockup.

Q Did you talk to Petitioner after the trial was over?

A No, I did not.

Q Have you talked to him subsequent to the conclusion of the trial

A No.

Q up to the present time?

A No, I have not talked to him any more since then.

Q Did you, at any time during your representation of Nelson and Mines, advise him of a right to an appeal?

A I don't recall that the subject ever came up, I would not—frankly, would not think that I would have talked to him about it beforehand and I did not talk to him afterwards. I frankly felt at that time and feel now that an appeal would have been absolutely frivolous.

Q During the course of the trial did you point to any errors in the record?

A I don't recall, I would assume that I made standard objections, I don't recall—or that either—Mr. Turner and I—let me say this: Mr. Turner and I tried this together, and it may have been very possible, this has been sometime ago now, that he may have actively handled the case and I may have merely sat there and assisted him. If there were any objections, I would say that we—that anything that came up as in normal course we would have made those objections.

Q You have indicated that you probably or you did make the standard objections, would that include the motion to set aside the verdict as being contrary to the law and evidence in the case?

A I don't—don't know, I don't recall.

Q Well, what do you call a standard objection?

A Well, anything that would come up in the trial of a case, if the evidence, as it was offered, was in my opinion inadmissible, if I felt that there would be grounds for a motion to strike, if I had a felt that in my opinion that a motion to set aside the verdict would have been probable, now—or possible—now, I will make the statement, in my

practice to law I do not make frivolous objections or frivolous motions. I have the—and I believe that the Judges in the Courts that I try the cases before understand this. I make motions only when I think that I at least have an argument behind them, and I don't recall that I made any in this case and I do recall very vividly that it—there was a very, very strong case put up against this man and we and myself at that time did not feel that the case was nearly so strong against Ernest Mines, but against this man it was extremely strong.

Q Were you aware of the or, rather, did you procure the services of a psychiatrist to examine the petitioner?

A No, I did not, there was no—there again, the petitioner gave no indication that he needed psychiatric help, he gave no indication that such an examination was indicated and I believe at that time and since that time, also I do happen to be a Special Justice of the County of Henrico, and so I do run into contact with people of that nature and when—

Q Are you aware that the petitioner—whether he was examined by—

A I would say that he was not, I have no indication at all that he was.

Q Was the—was a transcript made of the trial?

A I—if—I don't recall when the practice of using the dictating equipment was started in this Court, it sticks in my mind it was later than this, in '63, I believe and we had no court reporter present, so if there was not a dictaphone tape transcription of it, there was none.

Q Were—at that time were you aware of the Virginia Statute which provides,—which contains a provision for a free transcript

A Yes.

Q for an indigent?

A Yes, uh huh. I was also aware of the Supreme Court of the United States cases which required to be given to them.

Q No further questions.

CROSS EXAMINATION

BY MR. HARP:

Q Mr. Oxenham, if I told you that the record reveals that this man was examined by Dr. Harry Brick and a report made to the Court you would—could not deny that, could you?

A No, as I stated in answer to direct examination, I don't—I just simply don't recall. The only thing I can recall is that nothing of my memory or in my notes indicated that to me that this would have been necessary.

Q And what defense, if any, was offered in connection with this case?

A Well, of course, the defense that came up in connection with this was the fact that he was not the person, that there was a case of mistaken identity. Now, this was the one of which the defendant himself came up with by his statement that he was at that time in Boston, Massachusetts, and not in the City of Richmond. There were some witnesses that were—one local witness I know that was given to me the name and address, one on behalf of Mines and one on behalf of this man, I believe, the name of Mrs. Janie Anderson at 2104 DeForrest, in Wickham Court, was given to me. I attempted to locate this woman without success.

Q That's all.

THE COURT: Any further questions.

(Witness stood aside.)

NOTE: At this time a short recess was had, after which:

R. A. Turner,

introduced on behalf of the Petitioner, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOUGLAS:

Q Would you state your name and address, please?

A Richard A. Turner, 200 West Grace Street, Farm Bureau Building.

Q What is your occupation, Mr. Turner?

A I am an attorney.

Q For the record, would you tell us how long you have been practicing law, please?

A It would be 15 years May the 2nd, 1967.

Q Now, would you relate the circumstances by which you first came in contact with Russell Judas Nelson?

A I was appointed by the Hustings Court to defend Russell Nelson and one, Ernest Mines, on a charge of robbery and attempted rape, they were companion cases, the date of the appointment I can't say, but it was on the docket for the November Term of '62.

Q Was anyone appointed to assist you in the defense of—

A Yes, sir, Thomas Oxenham.

Q Well, do you recall how many other accused in which you were to defend during that term,

A Well, I—

Q or that date?

A the only thing I can answer, if you give me a minute —on that particular day?

Q That's right.

A Oh, let's see, I can probably answer that for you in a minute, I've got so many papers in here, I hope you will bear with me a second.

Q All right.

A There's one, two, three, four five, six, seven—seven were originally scheduled for that day, one was *nol prossed*—now, let's see if any of them were continued—(pause)—I have no notes indicating—it may have well been, but I have no notes indicating that any of the other six were continued, one—I mean one of the seven was *nol prossed,* six of them probably went on to trial.

Q How many times did you interview Nelson before he was tried for the two crimes?

A The only recollection I have of that is once—Nelson and Mines.

Q Was this interview conducted along with your associate counsel?

A Yes, sir, yes, sir.

Q Did the defendant, Nelson, make a statement to the Court after he had been sentenced, I think the record has indicated that the trial was held on November 27, 1962, do you recall whether—

A Well, now wait a minute, if I may go back, Your Honor, my notes, I just said seven cases on that day, I

wanted to make a correction there, all I have—I was reading another docket, I only actually had three scheduled on that day, four including the Mines case, so I want to correct that, if Your Honor please. Now, excuse me for interrupting you, what was your question again?

Q Do you recall whether the defendant made a statement to the Court after he had been sentenced?

A I can't recall whether he did or not, if you would be more specific it might refresh my memory. I don't—I don't recall whether he made any statement or not, if you are speaking of a—

Q Do—what was the—what defense did the defendant, Nelson, ask you to assert on his behalf?

A He told us during the interview that he was not present in Richmond, an alibi defense, that he was in Boston, and said he had bus stubs to prove when he came back and his statement to me was around—he left on the 19th of September and come back on the 5th of October, and to the best of my recollection—I'm not positive of this, I know that what I've just told you is what he told me, I believe I recollect him exhibiting a bus stub to me at the City Jail when I was interviewing him.

Q Did he maintain that alibi or that defense throughout the trial, did he ever change that?

A Well, he never took the stand, neither of the—and these were tried together—and neither of the defendants took the stand, he maintained all along in his interview with me and he never changed that, that he was in Boston and he was not in Richmond at the time,

Q He—

A but as I say, he didn't testify.

Q Did the defendant ever indicate to you that he wanted to appeal the—

A No, sir.

Q verdict of the—

A No, sir, and I will say this, if I may, we tried the Mines case at the same time, at the agreement of these parties as well, and Mr. Oxenham and myself both tried this case, it wasn't a question of one of us trying it, we were both present and both tried it, and we felt so strongly after the case was concluded, the Commonwealth's evidence, that Mines was—had not been proven guilty by the evidence, it was just a question of identification of Nelson but that we felt so strongly that the Commonwealth had not proven a case against Nelson that I distinctly recollect and still feel this way, walked back into the lockup and this man was in the lockup as well, they took them both back together, and as a matter of fact, told Mines that we thought he would have a good chance to appeal, if he wanted to appeal, let us know, and we never heard any more, and I don't know how close he was standing or—I can't say that I saw him standing there or sitting in the back, I know he was in the lockup at the time we were talking to Mines, and Mr. Oxenham and I both still felt the same way, that the Commonwealth's evidence was not sufficient to convict Mines.

Q Well, during the course of the trial did you point to any errors on behalf of either defendant?

A Do you mean in reference—errors of the Court in reference to admission of evidence or anything of that sort?

Q That's correct?

A I can't recollect whether I did or not, if you would be more specific I might could tell you, because I really

don't know, I do have a recollection of the evidence and I do have a notation of the evidence, but I know of no—no particular—I can't recall any specific objection I made to evidence that was admitted on the basis that it was error to admit it—

Q You indicated that you were confident that the evidence was insufficient or you felt that the defendant, Mines, would have a very good chance on appeal, I think that is the way you—

A Yes, sir—

Q stated it, is that correct?

A Yes, we thought, we thought that it was—and we made a motion to strike and argued it very vehemently here, both Mr. Oxenham and myself.

Q Was that made in both cases or just in one?

A Just in reference to Mines, because of the nature of the evidence. We did speak in behalf, it is my recollection, of Mr. Nelson, but it was not on the same basis, and if you care for me to give you a little more detail as to why there was a distinction, I—it would be very simple for me to do because I do have a notation on it here.

Q That's all right.

A All right.

Q Do you know whether a transcript was made of the trial proceedings?

A No, I do not. I—it is my recollection there wasn't any court reporter here and I don't—I frankly don't remember whether they had the tapes in those—at that time or not, I understand that that came about subsequently.

Q Did—did the question of the sanity of the defendant ever come up?

A No, sir. I would have—there would have been no mistake about that,

Q Uh huh.

A although I can't recollect exactly—I would have put a notation of that in my file.

Q Was the defendant, Nelson examined by a physician?

A Not to my knowledge. He never made any claim or indicated in any way to me from my notes here as to our conversation that that was—not only he never made any issue of it from his conversation with me, I saw no reason to make such a motion, frankly. Nothing indicated to me that he needed an examination.

Q Now, as I understand the testimony, is it that you talked to the defendant, Mines, about an appeal, since you did not talk to defendant, Nelson?

A Not directly, no.

Q Not directly, he may have overheard you, but you didn't—

A I couldn't even testify to that, all I know is he was in the lockup too, because we all went back together. This was after the trial was over and after I motioned to strike, they went back there and I couldn't say I went right back with them then again or whether I went back at a later time, but all the men were in the lockup, I don't think they had taken any out—

Q Did you ever—did you talk to defendant, Nelson, after the trial had concluded.

A I have no present recollection of that, the only thing I can tell you is my usual procedure in public defender cases, and I had been handling them quite a few years when this

case came up. My usual procedure is to tell them that they have a right of appeal, and I usually do not—I usually tell them to write directly to the Court, if they want it. I do not tell them that I would note it—will note it for them, except in those special instances where I feel, personally myself, that I—as Mines was in this particular case, I did—

Q Did you tell him anything about the time required?

A I am sure that I didn't say anything about that in this particular case, no, sir. I may have, but I give them general information about appeal, but I couldn't—I couldn't say that—well, I'm sure I didn't speak directly about an appeal, I'm sure of that.

Q I have no further questions.

CROSS EXAMINATION

BY MR. HARP:

Q If I understand then, sir, from your testimony, subsequent to the sentencing of this man Nelson that you and Mr. Oxenham went back to the lockup when Nelson was incarcerated to talk to Mines, is that correct?

A Yes, we did. Now, I might qualify that a bit by this: My recollection is that Mr. Oxenham—both felt very strongly in the Mines case and I know that I went back and my recollection is that he was present with me.

Q This was on the date that—they were both tried together, not on the date

A This was—

Q Mines was sentenced later, is that correct?

A This was shortly—no, sir, this was shortly after—shortly after the trial and shortly after the motion to strike

because Mr. Oxenham and myself were both upset about the Court's decision on our motion to strike.

Q And if the Record shows this man was examined by Dr. Harry Brick and a report filed, you couldn't deny that, could you?

A No, sir, I could not because I don't have any recollection and there's not a thing in my notes to indicate that he had one.

Q Well, was it your defense to try to shake the identification of the prosecutrix then?

A It seemed to be the only case we had and perhaps to try to convince the Court that this man was in Boston and I under—and he did, I know that he did say he was there, and I'm sure that he exhibited to me a bus stub, but whether that was presented in the evidence, I cannot say.

Q And—but your notes indicate that he did not testify, is that correct?

A That's the way my notes indicate.

Q That's all.

REDIRECT EXAMINATION

BY MR. DOUGLAS:

Q Did you examine the Record?

A No, sir, I haven't done a thing on this case, I was subpoenaed as you probably know—

Q I mean prior to the trial?

A Which record are you speaking of?

Q Well, I assume that there was an indictment?

A Oh, you mean did I look at the indictment?

Q Yes, sir?

A Oh, yes, I always write the copies of the indictment down in a—I keep all my records in this book for a Term. I've got a better—even a little better system now, but this begins with a copy—I come up, take the indictment out for all cases I have been appointed in before I interview anybody, before I do anything. It's usually the day after docket day, and I write down what the charge is. I usually list, and I did in this case, the witnesses that the indictment shows appeared at the Grand Jury, in this case was Vann, Randolph Vann, J. E. Robinson, Price, Boyer, Robinson, Viola Scott, and I write—take those off the indictment, and then I go over to the Jail after I do all of those and interview the particular defendants, and the reason for that is because I want—I ask them the specific question of what is this witness going to say, and I always do that and I did that in this case, here, see, this book begins that way, the nature of the charge, the witnesses, if there's companion cases, what he desires to plead, what my suggested plea is after interviewing him.

Q No further questions.

MR. HARP: No questions.

THE COURT: Stand aside. Call your next witness.

(Witness stood aside.)

MR. DOUGLAS: Your Honor, for the record, I would like to state that Ernest Mines, the co-defendant with Russell Judas Nelson, he is presently on parole and I have advised him that he didn't have to—

THE COURT: I can't understand you.

MR. DOUGLAS: Counsel have advised Mines that he doesn't have to relate any of the circumstances that occurred, I want to repeat that in the presence of the Court.

THE COURT: You understand your attorney has stated you do not have to testify unless you desire to do so.

Ernest Mines,

introduced on behalf of the Petitioner, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOUGLAS:

Q Would you state your name and address?

A Ernest Mines.

THE COURT: Speak up, please.

A Ernest Mines, 2306 North Avenue.

Q Now, would you relate to the Court how you came in contact with Russell Judas Nelson and—in 1962, I'm referring to the two criminal charges which were placed against you?

A Well, I seen Nelson when they brought him to jail.

Q What I'm trying to get at, did you

THE COURT: We're not going to re-try the case.

MR. DOUGLAS: Sir?

THE COURT: We're not going to re-try the case—

MR. DOUGLAS: No, sir, I just want to get into the appointment of counsel—

THE COURT: Yes.

Q Did you employ a lawyer to represent you for the two charges that were brought against you in October
A No, sir.

Q and November of 1962?
A No, sir, the State did it.

Q You did not. Do you know the names of the lawyer?
A Lawyer Turner and *Ox*.

Q How many times did you—did you see the lawyers?

MR. HARP: Now, if Your Honor please, I don't see what difference it makes this man's already had his habeas corpus hearing. How many times they saw him I think is of no interest in this proceeding.

THE COURT: Has nothing to do with this case.

MR. HARP: He's already had his petition denied once.

Q Did—did you testify, did you take the stand in that case?
A Yea.

Q Did the defendant, Nelson, make a statement to the Court at the conclusion of the trial, did he say anything?
A No, he started—shed some tears, and only thing he said, please give him a break, say he couldn't do all that time, he had ten years waiting for him, something like that. I think that was all he had a chance to say.

Q Were you taken to the lockup after this trial?
A Yea, they carried me back there.

Q Did you talk to your lawyer after the trial?
A I didn't talk to him after the trial, no.

Q Did he talk to you?
A He didn't even come back.

Q Were you advised of the right of an appeal?
A No, I wasn't.

Q Did you ask your lawyer anything about an appeal?
A Yes, I did, after I was sentenced, I asked him.

Q What did you ask him?
A I asked him was it any chance of me going to a higher court, he told me no.

Q Did he give you any reason?
A No reason whatsoever.

Q Do you know whether Nelson asked about an appeal?
A No, I don't.

Q I have no further questions.

CROSS EXAMINATION

BY MR. HARP:

Q You realize you are under oath now, don't you?
A Yea, I do.

Q And did you come here voluntarily or were you subpoenaed?
A I was subpoenaed.

Q And it is your testimony, as I understand it, that on the day you were tried, not the day you were sentenced, but the day that you and Nelson were tried together here in this Courtroom, after the trial was over, it is your testimony that neither Mr. Oxenham nor Mr. Turner came back and saw you in the lockup back here and told you that they thought that their motion to strike, their motion to set aside the verdict should have been granted and that they would appeal the case if you would ask them to?
A No, neither one of them came back there.

Q Neither one of them said that?
A No.

Q That's all.

MR. DOUGLAS: No further questions.

(Witness stood aside.)

THE COURT: Anything further, gentlemen? Is that the case?

MR. DOUGLAS: Yes, sir, that is the case.

THE COURT: You submitting it to the Court?

MR. HARP: Mr. Schumann, I want to call Mr. Schumann.

THE COURT: All right.

Louis A. Schumann,

introduced on behalf of the Respondent, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HARP:

Q Please state your name, address and occupation, sir?

A Louis A. Schumann, Deputy Clerk, Hustings Court, City of Richmond.

Q You were so employed on November 27, 1962?
A I was.

Q And do you have with you the records pertaining to the robbery and attempted rape conviction of Russell Nelson, which were imposed upon him on that date?

A I have two indictments, true bills, returned by the Grand Jury on November 5, 1962.

Q Were those the records pertaining to those two trials that you have?

A Yes, sir.

Q Have you reviewed those records to ascertain whether or not there is any letter addressed to Judge Huntley therein from Mr. Nelson?

A I have.

Q Is there any such letter?

A There is none.

Q Is this where the letter would have been filed had it been received?

A That's the custom.

Q That's all.

THE COURT: Any questions.

MR. DOUGLAS: I have no questions.

MR. HARP: You may stand down. The Respondent rests, if Your Honor please.

THE COURT: Very well. Is that the case?

MR. HARP: Yes, sir.

MR. DOUGLAS: Your Honor, I think the evidence in this case shows that the defendant was denied his right of an appeal. We do not have a written request in the case, however, the defendant testified that he had a friend to write to the Court, he couldn't tell us the contents of the letter, he only says that he was interested in getting into the Court, coming back into Court, I forget the exact words of what he used. The fact that the defendant—even if we

don't have a request, have no letter, I still think that the evidence would show that the defendant was denied a right of an appeal. The attorney testified that he probably made the normal objections in one case. They thought that it was very strong and that they felt that there was a good opportunity of an appeal for the defendant Mines, but they were of the contrary opinion in the case of Nelson.

Our Court of Appeals has indicated many times that the defendant's right to an appeal shall not be prejudiced by Counsel's opinion, whether the defendant has anything to gain. Here, the indigent condition of the defendant was known. The defendant had limited education. Counsel for the defendant at that time concede that they didn't say anything about a transcript, a free transcript, that they didn't say anything about the right to an appeal.

Here the defendant gave an alibi and he proclaimed his innocence throughout the interview and there is no evidence that there was any change. He thought that he was not guilty of this crime, of these crimes, so I believe that it was encumbent upon counsel to indicate that he had the right for another Court to review the proceedings. This wasn't done in this case.

On October 10th the case of Billy Junius Russell, again our Court of Appeals indicated very strongly that it is not necessary for the defendant to make a formal request. There, the Court said that it can be inferred from the evidence that the defendant wanted an appeal. Counsel concedes that in that case counsel for Russell conceded that he may have talked about the right to appeal, but he wasn't sure as to the level of the dicussion. I think that that case is controlling on the case at Bar, . . .

THE COURT: Well, my understanding of the testimony of counsel in this case, the Court has competent counsel

appointed, that the victim in this case had known the accused, Nelson, prior to what had occurred, and, therefore, the reason why she couldn't identify him was the question of the bus ticket, apparently was not proved to the satisfaction of the Court at that time. Counsel further stated that he felt that he did not have sufficient grounds for appeal, yet on the other hand the other defendant they did think had grounds for appeal, and retired to the bull-pen in the rear of the Court here, it's quite small, where both of them were incarcerated, talked to one, the other was bound to hear, and told one of them that he did—should appeal the case, which he didn't do. There is no evidence that any appeal was requested by the defendant in this case. Under the circumstances the Court will deny and dismiss the petition.

(Hearing concluded.)

APPENDIX V

Memorandum Decision of the United States District Court of September 26, 1968

The petitioner filed a petition for a writ of habeas corpus on December 26, 1967, and was granted the right to proceed in forma pauperis. The respondent answered and moved to dismiss.

Petitioner is currently serving a term of 15 years in the Virginia State Penitentiary pursuant to a conviction of robbery and will begin serving a term of 10 years pursuant to a convcition of attempted rape, in the Richmond City Hustings Court, May 20, 1962; and a term of 10 years pursuant to a conviction under the Virginia Recidivist Statute (Va. Code Ann. § 53-296) (5 years suspended during good behavior), in the Richmond City Circuit Court

on December 27, 1962. The three sentences run consecutively.

The petitioner challenges the above convictions on three grounds:

1. There was insufficient evidence, showing lack of probable cause, in violation of the 4th amendment to the United States Constitution.

2. Petitioner is a victim of a denial of the equal protection of the law, in violation of the 14th amendment to the United States Constitution.

3. Petitioner has suffered the ineffective assistance of counsel in violation of the 6th amendment to the United States Constitution.

The Court finds that ground #1 is without merit after a careful consideration of the records in the instant case.

The Court finds that the petitioner abandoned ground #2 in the state habeas corpus proceeding, and therefore the highest court of appeals for the State of Virginia has not had the opportunity to hear the issue. Accordingly, the petitioner has not exhausted his available state remedies as to this allegation. *Key* v. *Holman,* 346 F. 2d 153 (5th Cir. 1965); 28 U.S.C. § 2254 (See p. 4, transcript of hearing December 7, 1966, in the Hustings Court of the City of Richmond.)

As to ground #3, the pertinent facts found in the state hearing are as follows:

Following the findings of guilty on the attempted rape and burglary charges, the petitioner was escorted from the courtroom to the "bullpen" in the rear of the Court. The Court had appointed two attorneys to handle petitioner's case. Petitioner claims that neither attorney spoke to him

of an appeal or any procedure to perfect one, nor saw him at all from that time forward. (pp. 11, 16, 17, 18 State hearing). One of the attorneys, Thomas Oxenham, freely admitted that he did not talk to the petitioner after the trial or at any time thereafter. (See p. 29 State hearing.) The same attorney admitted, when questioned as to whether he advised petitioner of his right to appeal, "I don't recall the subject ever came up. I would not—frankly, would not think that I would have talked to him about it beforehand, and I did not talk to him afterwards." (See p. 29 State hearing.) The other court appointed attorney, Richard A. Turner, when questioned in reference to advising petitioner of a right to appeal, stated: ". . . walked back into the lockup and this man [Nelson] was in the lockup as well, they took them back together [there had been another defendant tried that day and represented by Turner and Oxenham], and as a matter of fact told Mines [the other defendant] that we thought he would have a good chance to appeal . . . I can't say that I saw him [Nelson] standing there or sitting in the back. (See p. 38 State hearing)" Turner was later asked (see pp. 41, 42 State hearing):

Q. Now, as I understand the testimony, is it that you talked to the defendant, Mines, about an appeal, since you did not talk to the defendant, Nelson?

A. Not directly, no.

Q. Not directly—he may have overheard you, but you didn't—

A. I couldn't even testify to that. All I know is he was in the lockup too . . . I couldn't say I went right back with them then again, or whether I went back at a later time, but all the men were in the lockup, I don't think they had taken any out—

Q. Did you ever—did you talk to the defendant, Nelson, after the trial had concluded?

A. I have no present recollection of that . . . well I'm sure I didn't speak directly about an appeal, I'm sure of that.

The other defendant, Mines, stated that he did not talk to his attorneys (Turner and Oxenham) after the trial. (See p. 48 State hearing):

Q. Did you talk to your lawyer after trial?
A. I didn't talk to him after trial, no.

Q. Did he talk to you?
A. He didn't even come back.

No transcript of the trial proceedings is in existence.

Petitioner never perfected an appeal, and there is no record of his attempting to do so, though he states he wanted to and tried to write a letter to that effect.

> "Although the district judge MAY, where the State court has reliably found the relevant facts, defer to the State court's findings of fact, he MAY NOT defer to the State court's findings of law. IT IS THE DISTRICT JUDGE'S DUTY TO APPLY THE APPLICABLE FEDERAL LAW TO THE STATE COURT FACT FINDINGS INDEPENDENTLY. THE STATE CONCLUSIONS OF LAW MAY NOT BE GIVEN BINDING WEIGHT ON HABEAS. . . . He may . . . accept the facts as found in the hearing. BUT HE NEED NOT." (Emphasis added) *Townsend* v. *Sain*, 372 U.S. 293, at 318 (1963).

Having studied the record, this Court is satisfied that the record is an adequate basis on which to make a decision. Therefore, there is no need for a plenary hearing. *Smith* v. *Peyton,* 280 F. Supp. 669 (U.S.D.C., W.D. Va. 1968).

In *Fox* v. *State of North Carolina,* 266 F. Supp. 19, at 21 (1967), the Court stated:

> "It is desirable for trial counsel in every case in which the defendant has been convicted upon a plea of not guilty to inform the defendant of his appellate rights and the limitations thereon. A failure to do so has been held to be ineffective assistance of counsel."

In *Wynn* v. *Page, Warden,* 369 F. 2d 930, at 932 (10th Cir. 1966) the Court stated:

> "A full examination of the record on appeal convinces this court that appellant was convicted and confined that he was not afforded the assistance of counsel concerning his right of appeal and the exercise thereof, that he did not knowingly forego his right to appeal his conviction, and that he did not fully understand his Constitutional rights in the matter. . . . Appellant did not see his counsel after the verdict was returned and judgment and sentence was imposed . . . No one, not even his attorney, advised appellant of his right to appeal the conviction and sentence, of his right to file a pauper's affidavit, and of the proper appellate procedure. Appellant testified that after he was imprisoned he tried to get hold of his trial attorney . . . HE ALSO TESTIFIED THAT HE KNEW HE HAD THE RIGHT TO APPEAL BUT DIDN'T KNOW

> HOW. It appears that appellant's attorney was of the opinion that no reversible error occurred and there was no discussion after the trial between counsel and appellant concerning appeal . . . We believe we cannot disregard the apparent fact that appellant's fundamental right to assistance of counsel concerning his right to appeal was not adequately safeguarded." (Emphasis added)

In *Smotherman* v. *Beto*, 276 F. Supp. 579, at 585 (1967) the Court stated:

> "When the state chooses to provide representation for an indigent defendant, it must assure that the right to counsel remains inviolate from the beginning of the trial up to and including the appellate review, or in the absence of an appeal, TO SUCH TIME AS THE DEFENDANT INTELLIGENTLY WAIVES AN APPEAL. To this end, court appointed counsel MUST advise the defendant NOT ONLY that he has a right to appeal, but he must be admonished of any time limitations on the right to appellate review which the state has imposed." (Emphasis added)

In the *Smotherman* case, *supra,* court appointed counsel related that he did not recall talking to petitioner after the sentencing.

> "There is thus presented the case where a convicted defendant, who was represented by court appointed counsel, knew of his right to appeal, desire to pursue the appeal, but the state records reflect that no such appeal was taken." *Smotherman* v. *Beto, supra,* at 584. See also, *United States* v. *Mancusi,* 275 F. Supp. 508, at 523 (N.Y. 1967).

The transcript of the trial proceedings which led to the conviction of petitioner are not in the record. Accordingly, this Court concludes (1) petitioner did not waive his right to appeal; (2) he was not afforded reasonably effective counsel for the reasons stated herein and thereby was denied his Constitutional right of effective counsel and his right of appeal.

The judgments of conviction will be vacated. The State will be given 60 days in which to permit the petitioner a late appeal or to retry the petitioner, if it so desires. In the absence of such within the allotted time, the respondent will discharge the petitioner.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

September 26, 1968

APPENDIX VI

Order of United States District Court of September 26, 1968

For reasons stated in the memorandum of the Court this day filed, it is ADJUDGED and ORDERED:

1. The judgments of conviction for robbery and for attempted rape entered May 20, 1962 in the Richmond City Hustings Court are vacated.

2. The judgment of conviction under the recidivist statute entered December 27, 1962, in the Richmond City Circuit Court is vacated.

3. The respondent shall release the petitioner from further custody pursuant to his conviction in the Hustings Court of the City of Richmond, Virginia, on May 20, 1962, upon indictment for robbery.

4. The effect of this order is stayed 60 days to permit the Commonwealth of Virginia to allow the petitioner a late appeal, or retry the petitioner if it be so advised.

5. The Clerk is directed to return the state records after 30 days if no appeal is noted. If an appeal is noted, the Clerk is directed to retain the records pending final disposition of the case.

Let the Clerk send copies of this order and the memorandum of the Court to the petitioner and the Attorney General of Virginia.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

September 26, 1968.

APPENDIX VII

Motion to Alter or Amend Judgment of October 4, 1968

Pursuant to Fed. R. Civ. P. 59(e), respondent moves the Court to alter or amend the judgment heretofore entered in this action, insofar as said judgment adjudges that petitioner was denied his right to appeal in that he did not waive an appeal, on the ground that the judgment is in contravention of fact (see State Hearing Transcript, pp. 17, 18, 16, 31, 29, 37, 23, 24) and law (*Allred* v. *Peyton,* 385 F.2d 360, 362 (4th Cir. 1967); *Peyton* v. *Webb,* 207 Va. 417, 149 S.E.2d 889 (1966); *Sand* v. *Peyton,* Memorandum Decision No. 12,647 (4th Cir. Oct. 2, 1968) (copy attached).)

Respondent says that Fed. R. Civ. P. 59(e) applies to habeas corpus proceedings (*Hunter* v. *Thomas,* 173 F.2d

810 (10th Cir. 1949)), and he desires a hearing on the motion.

C. C. PEYTON, Superintendent of the Virginia State Penitentiary

By: .....
Counsel

ROBERT Y. BUTTON
Attorney General of Virginia

RENO S. HARP, III
Assistant Attorney General

GERALD L. BALILES
Assistant Attorney General

Supreme Court Building
Richmond, Virginia

MOTION TO ALTER EXHIBIT I

[*Sand* v. *Peyton*, Mem. Dec. No. 12,647 (4th Cir., October 2, 1968)]

A review of the record discloses that an appeal from the order of the district court denying habeas corpus relief would be entirely without merit. We are in accord with the district court that Sand has failed to establish (1) ineffective representation by his court-appointed counsel and (2) involuntariness of his confession. While it is unnecessary to base the decision upon it, we also note that a plea of guilty often "swallows up" errors even of constitutional magnitude. *Vanater* v. *Boles*, 377 F.2d 898 (4th Cir. 1967).

The petitioner raised one point not fully discussed in the district court's opinion: that he had been denied his right to appeal. Despite the logical absurdity in most con-

texts of an appeal from a judgment resting on a guilty plea, it is now well established that there is such a right. It is true that the trial attorney stated that there were no grounds for an appeal and that consequently he did not tell Sand that he had a right to appeal with free court-appointed counsel to prepare his appeal. But the trial attorney also testified that Sand had not at any time requested an appeal, that he had never said anything to the attorney or the trial court that would indicate that he would like to appeal or was dissatisfied with the judgment of conviction, and that Sand had never complained to him, or to anyone else to his knowledge, of any event or occurrence from arrest through trial and sentence. (See state habeas corpus transcript, pp. 15-18.)

It is clearly settled law that a state criminal defendant may not be denied his right to appeal because of his indigency. Not yet, however, is a state prisoner relieved of the burden of making his wish for an appeal known—however ineptly. It is only in the federal court, and then only with respect to defendants tried on a plea of *not* guilty, that the trial judge must advise the defendant of his right of appeal. Fed. R. Crim. P. 32(a)(2). We held in *Allred* v. *Peyton*, 385 F.2d 360 (4th Cir. 1967), that a state prisoner may not claim a denial of his right to appeal as a basis for federal habeas corpus relief unless he shows that he desired an appeal and in some way made that desire known, either to his attorney or to the trial court. More recently, in *Williams* v. *Coiner*, 392 F.2d 210 (4th Cir. 1968), this court ordered the release of a prisoner who claimed that he was denied his right to appeal from a state conviction "[i]f upon investigation it is found that Williams desired and sought an appeal . . .," 392 F.2d 210, 213, and if, having sought an appeal, he was refused

one by his lawyer because of his indigence and was not informed of his right to an appeal at the state's expense. There is nothing in the record of the present case to indicate that Sand ever wanted, sought, or made known to anyone a desire for an appeal. It is significant that despite the fact that the Virginia Supreme Court of Appeals does, for good cause, allow belated appeals from judgments of conviction, Sand has not to this day requested a belated appeal, or given any indication that he would so request an appeal. Under these circumstances he cannot claim a denial of his right to appeal.

Accordingly, a certificate of probable cause is denied and the appeal dismissed. The Clerk is directed to file a copy of the district court's opinion with this memorandum decision.

/s/ CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

/s/ J. BRAXTON CRAVEN, JR.
United States Circuit Judge

/s/ JOHN D. BUTZNER, JR.
United States Circuit Judge

APPENDIX VIII

Order of United States District Court of October 4, 1968

The Court having considered respondent's motion to alter or amend the judgment entered in this cause under date of September 26, 1968, and having re-examined the entire record in this cause and concluding that the order of this Court aforementioned is correct and appropriate for the reasons contained in the Court's memorandum filed simultaneously therewith, and deeming it unnecessary to hear oral argument on respondent's motion,

The Court doth ORDER that said motion be, and the same is hereby denied.

Let the Clerk send copies of this order to the petitioner and the Attorney General of Virginia.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

October 4, 1968.

APPENDIX IX

Notice of Appeal

To: Honorable W. Farley Powers, Jr., Clerk
United States District Court, Richmond Division

Notice is hereby given that C. C. Peyton, Superintendent of the Virginia State Penitentiary, respondent above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from that part of the final judgment entered in this action on September 26, 1968, in which it was adjudged that petitioner was denied his right to appeal.

C. C. PEYTON, Superintendent of the Virginia State Penitentiary

By: .....
Counsel

RENO S. HARP, III
Assistant Attorney General

GERALD L. BALILES
Assistant Attorney General

Supreme Court Building
Richmond, Virginia

APPENDIX X

Order of United States District Court of October 22, 1968

It is ORDERED that:

1. Respondent may prosecute his appeal from the order entered September 26, 1968.

The Clerk is directed to transmit the record on appeal to the United States Court of Appeals for the Fourth Circuit and to send copies of this order to the petitioner and to counsel of record.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

October 22, 1968.

APPENDIX XI

Opinion of the United States Circuit Court of Appeals for the Fourth Circuit, 415 F.2d 1154 (4th Cir. 1969)

WINTER, Circuit Judge:

Concluding that petitioner, a state prisoner incarcerated under a fifteen year term for robbery and faced with two ten year consecutive, prospective terms for attempted rape and recidivism,[1] had been denied his right to effective assistance of counsel because he had not been advised of his right to appeal his convictions for robbery and attempted rape and that he had not waived his right to appeal, the district judge granted the writ of habeas corpus. He afforded the Commonwealth a period of sixty days in which to grant petitioner a belated appeal, or to retry him, if it be so advised. The Commonwealth appeals and we affirm.

---

[1] Service of five years of the term under the Virginia Recidivist Statute was suspended on good behavior.

Petitioner who progressed only to the sixth grade of school and who has a mental age of eleven years and an IQ of 73, was tried with a codefendant, one Ernest Mines, on their pleas of not guilty to charges of robbery and attempted rape in the Hustings Court of the City of Richmond on November 27, 1962. Petitioner was represented by two court-appointed counsel who were acting informally as public defenders and who were also appointed to represent Mines and other defendants in other cases. Both defendants were convicted; no appeal on behalf of petitioner was noted or perfected; no transcript of the trial was made.

Shattered by the outcome of his trial, the sentences imposed on him for the substantive offenses and the prospect of an additional sentence as a recidivist, petitioner made no statement in court after he was pronounced guilty. He was led from the courtroom to the lockup. There was evidence that he requested the opportunity to speak to his counsel. It is undisputed that one of his attorneys did not see him again after he left the courtroom. The other attorney did see petitioner in the lockup when that attorney went to talk to Mines, who was also in the lockup, about an appeal. That attorney had no recollection of speaking to petitioner; petitioner confirmed that they had no conversation. The only evidence in the record is that at no time during his pretrial interviews with his counsel, during the trial or thereafter, was petitioner told by his counsel or anyone else that he had a right of appeal under Virginia law, irrespective of indigency, or the manner and time in which to pursue that right.

Petitioner testified that in approximately December, 1962, a fellow-inmate wrote to the trial judge in his behalf. Petitioner's understanding was that the letter was written

because of petitioner's desire "to know how could I get back to the Court," but the actual contents of the letter were not known to petitioner. The official papers relating to petitioner's trial did not contain the letter, and the letter was not produced at the state post-conviction hearing.

From the facts of record we accept as correct the finding of the state habeas judge, concurred in by the district judge, that petitioner never made a request to appeal his case.[2]

I

The Commonwealth contends that the established rule in this circuit is that, in the absence of any indication by a defendant to anyone that he wished to appeal, defendant cannot claim that he was denied his right to appeal. The rule is claimed to be founded on our decisions in *Allred* v. *Peyton,* 385 F.2d 360 (4 Cir. 1967); *Magee* v. *Peyton,* 343 F.2d 433 (4 Cir. 1965); *Boles* v. *Kershner,* 320 F. 2d 284 (4 Cir. 1963), and such memorandum decisions as *Connors* v. *Peyton,* Mem. Dec. No. 12,157, December 18, 1968; *Morgan* v. *Peyton,* Mem. Dec. No. 12,337, December 6, 1968; *Sand* v. *Peyton,* Mem. Dec. No. 12,647, October 2, 1968; and *Smith* v. *Peyton,* Mem. Dec. No. 12,-265, November 15, 1968. Consequently, it is argued that since the state habeas judge and the district judge found that petitioner never made a request to appeal, this finding is dispositive and the judgment of the district judge granting habeas corpus relief should be reversed.

---

[2] Before initiating proceedings in the district court, petitioner sought a writ of habeas corpus from the Hustings Court of the City of Richmond. Counsel was appointed for him and he was given a plenary hearing. From a denial of the writ, he unsuccessfully sought a writ of error from the Supreme Court of Appeals of Virginia. On the issues which concern us, petitioner had thus exhausted available state remedies before he sought relief from the district court.

It is true that on more than one occasion we have intimated that the failure on the part of one seeking habeas corpus relief to have requested that he be granted his right to appeal was fatal to a claim that he had unconstitutionally been denied his right of appeal, and it is true also that in such cases the language we have employed has suggested that the failure of such a request is fatal even in the absence of a showing that the petitioner knew of his right to appeal. However, on close examination these cases do not appear to have considered directly the issue of whether a defendant must be informed in the first instance of a right to appeal, nor does it appear with clarity whether in fact the petitioners in those cases had been aware of their right to appeal. In the instant case the determinative, basic question is whether petitioner knew that he had a right to appeal. We conclude that petitioner did not, and the absence of such knowledge is a clear indication that he was denied the effective assistance of counsel. This follows because he did have a right to appeal, and it was the duty of his counsel to advise him of the right and how and when to exercise it. Indeed, on this record we conclude that petitioner was denied counsel at a critical stage in the proceeding leading to his incarceration so that, in accordance with current constitutional doctrine, he is entitled to release unless he is afforded a belated appeal or unless the Commonwealth elects to retry him. To the extent that language we have employed in the cases cited indicates to the contrary, we no longer consider it a correct statement of the law.

At times cast in terms of a defendant's right to counsel under the Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, in terms of due process clause of the Fourteenth Amendment, standing alone, in terms of the equal protection clause of the Fourteenth

Amendment, or in terms of a combination of these, the recent trend of decisions makes clear that every defendant has the unqualified right, whether or not indigent, to be represented by counsel at all critical stages of any prosecution against him. The right begins when the accusatorial process begins as to him. And where the states, which are not under the obligation to provide for appellate review, do provide for appellate review, his right to counsel continues through that stage of the proceedings and he must be afforded full resort to that review and to the documents and tools of appellate review, the same as if he were not indigent. Where counsel is clearly required at trial and in certain instances even before the formalities leading to trial have begun and where counsel is clearly required on appeal when provisions for an appeal have been enacted, we think that counsel is also required in the hiatus between the termination of trial and the beginning of an appeal in order that a defendant know that he has the right to appeal, how to initiate an appeal and whether, in the opinion of counsel, an appeal is indicated. This interim is a critical, crucial one for a defendant because he must make decisions which may make the difference between freedom and incarceration.

Thus, *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), establishes the basic right to counsel. "[A]ppointment of counsel for an indigent is required at *every stage* of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa* v. *Rhay,* 389 U. S. 128, 134 (1967) (emphasis added.) Such cases as *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), *Miranda* v. *Arizona,* 384 U. S. 436 (1966), *United States* v. *Wade,* 388 U. S. 218 (1967), and *Gilbert* v. *California,* 388 U. S. 263 (1967), mark the beginning point when the right to counsel comes

into being. Once the right has matured, the law is now certain that it continues through the conclusion of appellate review. *Douglas* v. *California,* 372 U. S. 353 (1963); *Swenson* v. *Bosler,* 386 U. S. 258 (1967). And "where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on request." *Carnley* v. *Cochran,* 369 U. S. 506, 513 (1962); *Puckett* v. *North Carolina,* 343 F.2d 452 (4 Cir. 1965). Even if counsel appointed to conduct an appeal concludes that the appeal is frivolous and desires to withdraw, he must, nevertheless, brief anything in the record which might arguably support the appeal; and if the court finds any legal point arguable on its merits, it must, prior to decision, provide another attorney. *Anders* v. *California,* 386 U.S. 738 (1967).

When the breadth and scope of the right to counsel as established by these cases is considered, we think it follows that an indigent defendant is entitled to have counsel after his trial has been concluded for at least as long as it is necessary for counsel to advise him of his right to appeal, the manner and time in which to appeal and whether an appeal has any hope of success, unless counsel has provided advice as to the right to appeal and the manner and time in which to appeal prior to the conclusion of trial, or unless the trial court has advised the defendant in the latter regard and shouldered the burden which is otherwise that of counsel. Where counsel, as in the instant case, treat their representation as terminated without having imparted such advice, a defendant's right to counsel has been effectively denied; or, where counsel have not treated their representation as terminated but fail to impart such advice, a defendant's right to effective assistance of counsel has been effectively denied. In either event, if the omissions of coun-

sel has not been supplied by advice imparted by the trial court as to the right to appeal and the manner and time in which to appeal, a defendant's Sixth Amendment right, as made applicable to the states by the Fourteenth Amendment, has been violated.[3] While we do not now decide the issue, we note that the rules in right to counsel cases are generally applied retroactively. *McConnell* v. *Rhay,* 393 U S. 2 (1968) (per curiam).

II

The district judge further found that petitioner did not waive his right to appeal. We think the district judge was correct because the record provides no support for the conclusion that petitioner knew that he had a right to appeal. Waiver, by federal standards, thus could not have occurred. *Johnson* v. *Zerbst,* 304 U. S. 458 (1938); *Fay* v. *Noia,* 372 U. S. 391 (1963). Under federal standards, one may not relinquish intentionally an unknown right.

We need not recite all of the evidence to support our conclusion. It is true that petitioner was never asked if he knew that he had a right to appeal in spite of the fact that the trial for the instant offenses was not his first court experience. But the record is undisputed that no one advised petitioner of his right to appeal the convictions we are considering and this, coupled with the lack of evidence that petitioner was ever a party to a previous appeal, petitioner's very limited intelligence and his uncontroverted testimony that he sought help from a fellow-inmate to "get back to

[3] The result we reach is in accord with that reached by other courts: *Wynn* v. *Page,* 369 F.2d 930 (10 Cir. 1966); *Smotherman* v. *Beto,* 276 F. S. 579 (N.D. Tex. 1967); *Fox* v. *State of North Carolina,* 266 F. S. 19 (E.D. N.C. 1967); *United States* v. *Mancusi,* 275 F. S. 508, 522-24 (E.D. N.Y. 1967); *United States* v. *Reincke,* 261 F. S. 457 (D. Conn. 1966), *aff'd.,* 383 F.2d 129 (2 Cir. 1967).

the Court" because he was unable to write his own letter can lead to no other finding.

III

In argument, the Commonwealth contended that petitioner was not entitled to habeas corpus relief unless he had established that he was prejudiced by the failure to have his convictions reviewed on appeal. Stated otherwise, the argument is that petitioner may qualify for relief only if he shows that an appeal by him would have been at least debatably meritorious so that he lost some right of potential value in the failure to obtain appellate review.

No transcript was made of petitioner's trial. His version of his defense was that he simply told his counsel the truth, i. e., that he had nothing to do with the girl and that he was in another city on the date of the alleged offenses. His counsel has no clear recollection of the course of the trial and no memory as to whether there were or were not, in their opinion, any specific grounds for appeal. One of his attorneys did recall that petitioner produced a bus ticket stub to corroborate his alibi, but he could not remember if it had been offered in evidence. In short, if we adopt the Commonwealth's argument, petitioner failed, at the habeas corpus hearing, to show possible error in his trial and the possibility that his convictions would be set aside.

Victor v. *Lane,* 394 F.2d 268 (7 Cir. 1968), and *McGarry* v. *Fogliani,* 370 F.2d 42 (9 Cir. 1966), strongly suggest, if not hold, that in such cases a petitioner must demonstrate that his appeal would have had some chance of success before he is entitled to habeas corpus relief. We do not agree that where the basis for relief is denial of counsel or denial of effective assistance of counsel that such a showing is a prerequisite to habeas corpus relief.

The right to counsel and the effective assistnace of counsel is too basic a right to condition entitlement thereto upon an uninformed, untrained, unintelligent, indigent petitioner's showing that his appeal would have at least debatable merit when the ability to make and preserve a record of what transpired was not even within his grasp. *Cf., Miranda* v. *Arizona, supra,* at 472-3. Where appellate review is provided it becomes an "integral part of the * * * trial system for finally adjudicating the guilt or innocence of a defendant," and denial of the right has been analogized to denying a fair trial. *Griffin* v. *Illinois,* 351 U. S. 12, 18 (1956). The right to counsel and the effective assistance of counsel goes to "the very integrity of the fact-finding process." *Linkletter* v. *Walker,* 381 U. S. 618, 639 (1965). Once denied, it seems to us, the burden of proving it valueless in a given case must rest upon the Commonwealth which denied the right by the omissions of the counsel it supplied, if, indeed, the law will countenance such a defense.

We conclude, therefore, that the district court should be affirmed. We conclude, also, that the conditions of the district court's stay of the writ are proper. Petitioner may be retired, if the Commonwealth is so advised. Conceivably, from the notes of the trial judge and other sources —a matter as yet unexplored—a record on appeal may be constructed and Virginia may conclude to grant a belated appeal on such a record.[4] At least, the Commonwealth should be granted the opportunity to pursue this possible avenue of relief for petitioner.

Affirmed.

---

[4] One of petitioner's counsel suggested that there *may* have been a recorded tape of the proceedings.

APPENDIX XII

Order of the United States Circuit Court of Appeals for the Fourth Circuit of October 6, 1969—Denial of Motion for Rehearing en banc

The petition of C. C. Peyton, Superintendent of the Virginia State Penitentiary, for rehearing en banc having been considered by the entire Court, it is, ORDERED, that said petition be, and it is hereby, denied; and

FURTHER ORDERED, That the opinion heretofore filed be, and it is hereby, modified by striking out the last sentence under Part I, page 10, of the slip opinion, and inserting in lieu thereof, "We do not now decide the issue of whether the rule we announce should be given retrospective application. *Cf., McConnell* v. *Rhay,* 393 U. S. 2 (1968) (per curiam)."

/s/ CLEMENT F. HAYNSWORTH, JR.
Chief Judge

/s/ SIMON E. SOBELOFF
United States Circuit Judge

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ HARRISON L. WINTER
United States Circuit Judge

/s/ J. BRAXTON CRAVEN, JR.
United States Circuit Judge

/s/ JOHN D. BUTZNER, JR.
United States Circuit Judge

I would grant the petition of the Superintendent of the Virginia State Penitentiary, acting through his counsel, the Attorney General of Virginia, for a rehearing in banc, primarily for the reasons assigned in the petition. In the

absence of intervening, controlling higher authority, I cannot agree that one panel of three judges should assume to disapprove and virtually nullify the decisions of other panels without formally publicizing the assent and approval of the full court. Rule 35(a) of the Rules of Appellate Procedure provides in pertinent part that a hearing or rehearing ordinarily will not be orderd except "(1) when consideration by the full court is necessary *to secure or maintain uniformity of its decisions,* * * *." (Emphasis added.)

Furthermore, the decision leaves open the question of retroactive or prospective application, a question which should not be left unsettled. As stated in the petition—"Candor certainly compels the acknowledgment that *Nelson* is a new ruling." The appellant-petitioner is entitled to be heard with reference to this important but unsettled question since its determination may affect the rights of countless other state prisoners. In sum, the case is a proper one for rehearing in banc.

/s/ HERBERT S. BOREMAN
United States Circuit Judge

APPENDIX XIII

United States Court of Appeals for the Fourth Circuit—Recent Cases With Holdings Directly Contrary to Nelson v. Peyton

Appendix XIII-A

Connors v. *Peyton*, mem. dec. no. 12,157 (4th Cir. Dec. 18, 1968)

John W. Connors, a Virginia prisoner, seeks to appeal from an order of the district court (Merhige, J.) denying his petition for a writ of habeas corpus.

Connors was convicted in 1956 on charges of abdueting a female for immoral purposes, of robbery, and of rape. He received life sentences for the abduction and rape convictions and fifteen years for the robbery conviction. In his petition to the district court, Connors presented five claims:

(1) Denial of the effective assistance of counsel in that he did not have a lawyer during the police interrogation.

(2) His confession was coerced by threats of the police that he would get a death sentence if he did not talk.

(3) Corpus delicti not proven.

(4) Denial of the right to appeal because he was not advised of this right.

(5) Insufficient evidence to support his conviction.

A review of the record and of the district court's opinion discloses that issues (1), (2) and (4) are without merit. The allegation of a denial of effective assistance of counsel because representation by counsel was not effected[1] until after the police had questioned him concerning the offense was not properly grounded since the mandates of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), are not applied retroactively. The allegation of a coerced confession was dealt with in the state court evidentiary hearing on Connors' petition for habeas corpus, and upon a review of the transcript of that hearing the court below found that threats which were alleged to have "coerced" the subsequent confession were

[1] Relatives of Connors retained counsel to represent him at trial.

not brought to the attention of the trial court; that the police officer advised him of his rights before taking his statement; that Connors' testimony was "replete with vagaries." Consequently, the issues were resolved against Connors by the trier of fact and the district court concluded that, "judging the issues by federal standards under the 'totality of the circumstances,' no constitutional violations appear."

The allegation of denial of the right to appeal was also without merit since there was no showing other than the bare fact that he was never advised of his right to appeal. Failure to appeal may not be excused upon a mere showing of neglect of counsel. *Dennis* v. *United States,* 177 F.2d 195 (4 Cir. 1949). "Failure of counsel to file notice of appeal will only justify relief * * * where there is also a showing of 'plain reversible error in the trial.' " *Dodd* v. *United States,* 321 F.2d 240, 245 (9 Cir. 1963). And the apparent failure of the petitioner to ask his retained counsel to appeal his conviction further reveals the lack of merit in this asserted ground for relief. *See Carter* v. *Peyton,* 262 F.Supp. 701 (W.D. Va. 1966).

The district court declined to consider or discuss the merits of Connors' contention (3) that the corpus delicit was not proven for the reason that, although the point was raised in the petition filed in the state habeas court, it was not developed at the state hearing, and therefore only a *pro forma* effort had been made to satisfy the exhaustion of state remedies requirement. However, this contention is clearly without merit. The substance of his claim appears to be that he was indicted and convicted on two counts of abduction, both of which charged, in essence, the same offense. It is true that the abduction indictment contained two counts, one charging the taking away of the female

and the other charging her detention. However, separate sentences on the two counts were not imposed and either count would have supported the life sentence. See Va. Code Ann. § 18.1-36 *et seq.* In these circumstances no constitutional rights of petitioner were violated by the inclusion of these two counts in the indictment.

As noted by the district court, claim (5) was not developed in the state habeas corpus proceeding and, although it appeared in the assignments of error to the Supreme Court of Appeals, the exhaustion doctrine requires "more than *pro forma* effort." The role of a federal habeas corpus petition is not to serve as an additional appeal. "Normally, the admissibility of evidence, the sufficiency of evidence, and instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented." *Grundler* v. *State of North Carolina,* 283 F.2d 798, 802 (4 Cir. 1960).

A certificate of probable cause is denied, and the appeal is dismissed.

The Clerk is directed to file with this memorandum decision a copy of the district court's opinion.

/s/ HERBERT S. BOREMAN
United States Court of Appeals

/s/ ALBERT V. BRYAN
United States Court of Appeals

/s/ HARRISON L. WINTER
United States Court of Appeals

Appendix XIII-B

Morgan v. *Peyton,* mem. dec., no. 12,337 (4th Cir. Dec. 6, 1968)

Lewis J. Morgan seeks a certificate of probable cause to appeal from an order of the district court (Dalton, J.) denying relief on his petition for habeas corpus.

Morgan attacks the validity of a conviction and five-year sentence for malicious wounding imposed on September 2, 1964, in the Nelson County, Virginia, Circuit Court. He contends that the conviction was invalid because (1) he was illegally arrested and detained; (2) he was illegally interrogated; (3) his guilty plea was involuntary in that he did not understand the charge to which he was pleading; (4) he was denied his right to appeal; and (5) he was ineffectively represented by counsel. The claim of ineffective representation is founded solely upon the claims of an involuntary guilty plea and denial of the right to appeal.

The district court accepted the findings made, after a hearing, in the state habeas corpus proceedings. We think that the record was an adequate basis on which to conclude that his factual allegations were refuted. He has failed to sustain his burden. What evidence there is tends to refute the allegations rather than support them. The arresting officer testified that Morgan was arrested without a warrant at the hospital where he and his wife, the victim of the shooting, were present. The arrest occurred immediately after Morgan's wife had stated to the officer that she had been shot by him. Under the circumstances the officer had probable cause to arrest Morgan, and there is no indication that the absence of a warrant resulted in any prejudice to him in subsequent proceedings.

The claim of "illegal interrogation" fails to state a claim on which relief can be granted. However "wrong" an interrogation may be, it is of no matter if no harm results to petitioner, and none is suggested.

Morgan's contention that he did not understand the charge against him when he pleaded guilty was likewise adequately, perhaps unnecessarily, refuted. At the trial he was questioned to some extent about his plea. In addition, his trial attorney testified at the habeas hearing that he had discussed the charge on several occasions, with Morgan and with members of his family. He never indicated, as Morgan claims, that the charge would or might be reduced to simple assault, or that a sentence of only one year might be obtained. He had suggested that Morgan plead guilty to the charge against him for two reasons—he did not believe that a jury would credit the account of the shooting given by Morgan; if Morgan should take the stand to testify, his previous record might be brought out, which would be extremely damaging, since he had been previously convicted of a number of violent crimes, including the murder of his first wife. The record supports the finding that he did understand the charge against him and the nature and consequences of his plea.

Morgan additionally claims that he was denied his right to appeal the conviction because his attorney failed to inform him that he could appeal, and failed to file a notice of appeal. Aside from the fact that a voluntary guilty plea operates as a waiver of all prior non-jurisdictional defects in the trial proceedings, and leaves very little to appeal, *see Nease* v. *United States,* 362 F.2d 256 (5th Cir. 1966), and the trial lawyer is therefore under no duty to seek an appeal, *Thacker* v. *Peyton,* No. 10,949, mem. dec. (4th Cir., June 6, 1968), the record shows that Morgan never

communicated to anyone any indication that he was dissatisfied with the result or handling of the trial, or that he wished to have an appeal. A defendant must indicate to his attorney or to the court in some way that he wishes to appeal before there is a duty on the part of the attorney to proceed further, the failure of which will constitute a denial of the right to appeal. *Allred* v. *Peyton,* 385 F.2d 360 (4th Cir. 1967).

Since the claim of ineffective representation is based solely on the two preceding contentions, which are resolved against Morgan, this claim is likewise without merit.

Accordingly, a certificate of probable cause to appeal is denied, and the appeal is dismissed.

/s/ CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

/s/ J. BRAXTON CRAVEN, JR.
United States Circuit Judge

/s/ JOHN D. BUTZNER, JR.
United States Circuit Judge

Appendix XIII-C

Sand v. *Peyton,* mem. dec. no. 12,647 (4th Cir. Oct. 2, 1968)

[See Appendix VII]

Appendix XIII-D

Smith v. *Peyton,* mem. dec. no. 12,265 (4th Cir. Nov. 15, 1968)

John William Smith appeals from an order of the district court (Dalton, J.) denying relief on his petition for habeas corpus.

Smith attacks the validity of a twenty year sentence for first degree murder imposed in the Circuit Court of Shenandoah County, Virginia, on September 28, 1962. Smith did not appeal from the conviction, but he did seek state habeas corpus relief, which was denied on October 3, 1966; a petition for writ of error was denied on March 7, 1967.

Smith asserts four claims in his federal petition: (1) that he was denied his right to appeal by his appointed attorneys; (2) that he was denied counsel at his preliminary hearing; (3) that he was not given a transcript of his trial for an appeal; and (4) that an eyewitness to the crime committed perjury at the trial, which was "admitted by witness in [state] habeas corpus hearing." In his state petition, the first and fourth grounds here alleged were asserted in support of a claim of ineffective assistance of trial counsel.

Smith's claim that he was never told by his appointed attorneys of his right to appeal as an indigent was to some extent contradicted at the state habeas corpus hearing. However, it is not necessary to this decision to determine whether this factual allegation is correct, since it clearly appears from the record of the state hearing that Smith never indicated, either to the court or to his attorneys, that he was dissatisfied with the conduct or result of the trial or that he desired an appeal. We have previously held that a defendant must make his desire for an appeal known to court or counsel in some manner, however halting or inept, before an affirmative obligation arises on the part of counsel to inform him of his right to an indigent's appeal. Where he fails to indicate in any manner that he wishes to appeal, he cannot claim that he was denied his right to appeal because counsel failed to inform him of his right. *Allred* v. *Peyton,* 385 F.2d 360 (4th Cir. 1967); *Sand* v.

Peyton, No. 12,647, mem. dec. (4th Cir., October 2, 1968). Since there is nothing in the petition or elsewhere in the record to indicate that Jones ever sought, or made known to anyone a desire for, an appeal, his allegation fails to state a ground for relief.

Smith's second contention, that he was denied counsel at his preliminary hearing, likewise is without merit. The preliminary hearing in Virginia is procedural in nature, being only for the purpose of determining whether probable cause for further proceedings exists. In the absence of some special circumstances not alleged or shown here, it is not a "critical stage" of the proceedings against a defendant, and the absence of counsel is not prejudicial. *Rambo* v. *Peyton,* 380 F.2d 363 (4th Cir. 1967); *Vess* v. *Peyton,* 352 F.2d 325 (4th Cir. 1965); *Ward* v. *Peyton,* 349 F. 2d 359 (4th Cir. 1965).

The fact that a trial transcript was not furnished Smith for an appeal is also asserted as a ground for relief. Obviously, since Smith did not appeal or attempt to appeal, he was not required to be furnished with such a transcript. It may be that this claim is founded on the state's failure to furnish him a transcript for his use in the state habeas corpus proceedings. (Before the state hearing, he made a motion for a transcript.) If so, he did not press the request at his state hearing, and he has failed to show any need for the production of the transcript. See *United States* v. *Shoaf,* 341 F.2d 832 (4th Cir. 1964); *Padgett* v. *United States,* No. 11,750, mem. dec. (4th Cir. September 23, 1968).

Smith's final claim is that a state witness committed perjury at his trial. Standing alone, this fails to state a deprivation of constitutional rights. The knowing use by the prosecution of perjured testimony does violate a defend-

ant's constitutional protections, but it must be shown that the prosectuion knew that perjured testimony was being given. *Mooney* v. *Holohan,* 294 U.S. 103 (1935); *Barber* v. *North Carolina,* No. 11,831, mem. dec. (4th Cir., May 9, 1968). In the present case, Smith has not only failed to show that the state knowingly made use of perjured testimony, but he has in fact failed to show that there was any perjury committed at the trial at all. At the state habeas corpus hearing a witness who had testified against Smith at his trial admitted that she had made statements before the trial concerning the circumstances under which Smith killed the deceased, which statements were not consistent with her trial testimony. But it was not shown that she had committed perjury, and the trial prosecutor testified at the habeas corpus hearing that he had been unaware of the prior inconsistent statements until Smith's attorneys cross-examined the witness at the trial. The record also shows that Smith's attorneys cross-examined the witness for some two hours about the prior inconsistent statements. The contention thus raises only a question of credibility, which the trial jury could properly determine, and which was fully developed at the trial for its consideration.

Accordingly, the order of the district court is affirmed.

/s/ CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

/s/ SIMON E. SOBELOFF
United States Circuit Judge

/s/ JOHN D. BUTZNER, JR.
United States Circuit Judge